Improving the Global Protection of Underwater Cultural Heritage by Transnational Governance

FINAL SUBMISSION

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Abstract

Coming into force in 2009, the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage has grown in reputation as the leading international instrument for the global protection of underwater cultural heritage (UCH). While the Convention introduced a number of positive developments in the international system protecting UCH, there has been a lack of research evaluating the legal framework from a more critical and macro perspective. This study therefore seeks to examine the possible weaknesses which may lie in the sole reliance upon an international treaty, as an instrument developed and enforced through the legal *system* of public international law. It argues that the multiple-value and global public good nature of UCH makes agreements between states to 'cooperate' in its protection prone to underproduction and poor compliance, when operating within such a consent-based system of law. It then argues that numerous features of Westphalian sovereignty – including sovereign absolutism, equality and territoriality – can each be found at the heart of a struggling system for governing the oceans, which has relied too heavily upon the positivist paradigm of nation state authority and its manifestations through state-led public international law and private international law.

Utilising an in-depth literature review across numerous law and governance research fields, as well as interviews with 11 expert respondents in the field of marine and UCH policy, the study examines: (1) what are the challenges relating to cooperation, compliance, and collective action in the protection of UCH if relying on "inter-national" governance, as is envisioned by the use of the UNESCO Convention; and, (2), assuming that new solutions are needed, whether "transnational" governance approaches – operating vertically at multiple policy scales (global-regional-national-local) and utilising private, public and hybrid actors in the provision and enforcement of regulation – might enhance the protection of UCH further. In particular, it seeks to examine whether global governance, regional-level regimes, and community-centred collaborative governance could each provide additional protections for UCH, beyond the horizontal Westphalian paradigm. The findings provide evidence of the weaknesses which would be inherent in the exclusive reliance on the UNESCO Convention and conclude that, in parallel, further efforts must be made to achieve new global, regional, and community policy regimes for UCH protection, operating with, within or without the nation state.

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Abbreviations

ABNJ	Areas Beyond National Jurisdiction
The 'Area'	The Deep Seabed beyond the Continental Shelf and EEZ
BBNJ Working Group	Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction
Buenos Aires Draft	International Law Association's 1994 Draft Convention on the Protection of the Underwater Cultural Heritage (signed in Buenos Aires)
CZ	Contiguous Zone
CPZ	Cultural Protection Zone (a 200-nautical mile zone providing jurisdiction over cultural heritage, proposed and rejected within the UNESCO negotiations)
Draft European Convention	Council of Europe 1985 Draft European Convention on the Protection of the Underwater Cultural Heritage
EEZ	Exclusive Economic Zone
EU	European Union
FAO	United Nations Food and Agricultural Organization
HELCOM	Helsinki Commission (also known as Baltic Marine Environment Protection Commission), appointed under the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area
ICJ	International Court of Justice
ICOM	International Council of Museums
ICOMOS	International Council of Monuments and Sites
ICOMOS Charter	ICUCH International Charter on the Protection and Management of the Underwater Cultural Heritage (adopted at the 11th ICOMOS General Assembly in Sofia in October 1996)
ICUCH	International Committee on the Underwater Cultural Heritage (a sub-committee of ICOMOS)
ILA	International Law Association
IMO	International Maritime Organization
IOM	Integrated Ocean Management

ILA	International Law Association
ISA	International Seabed Authority
IUCN	International Union for the Conservation of Nature
JNAPC	Joint Nautical Archaeology Policy Committee
LOSC	United Nations 1982 Convention on the Law of the Sea
MLG	Multi-Level Governance
MMO	Marine Management Organisation (UK)
MOP	Meeting of the States Parties under the UNESCO Convention
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MSP	Marine Spatial Planning
MSR	Marine Scientific Research
NAS	Nautical Archaeology Society
NGO	Non-Governmental Organisation
NOAA	National Oceanic and Atmospheric Administration (US)
OECD	Organisation for Economic Co-Operation and Development
OME	Odyssey Marine Exploration, Inc. (US)
OSPAR	1992 Convention for the Protection of the Marine Environment of the North-East Atlantic
Paris MOU	Paris 1982 Memorandum of Understanding on Port State Control
RFMO	Regional Fisheries Management Organisation
RSP	Regional Seas Programme, established under United Nations Environment Programme in 1974
(Annexed) Rules	'Rules Concerning Activities Directed at Underwater Cultural Heritage', contained in the Annex to the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage
SPAMI	'Specially Protected Areas of Mediterranean Importance', as established under the Specially Protected Areas and Biological Diversity Protocol of the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean

STAB	Scientific and Technical Advisory Body (appointed by the MOP and UNESCO Secretariat under the UNESCO Convention)
UCH	Underwater Cultural Heritage (for a more detailed definition, see Chapter 1)
UK	United Kingdom
UN	United Nations
US	United States
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNESCO Convention	UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage
UNESCO Secretariat	Permanent Secretariat Responsible for Assisting MOP in Implementing UNESCO Convention (Current Programme Specialist: Ulrike Guérin)
Valletta Convention	Council of Europe 1992 Convention on the Protection of Archaeological Heritage (signed in Valletta)
World Heritage Convention	UNESCO 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage

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Chapter 1

The Need for the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage

Chapter Abstract:

This chapter introduces the aims and objectives of this study. First, it maps out the study's intended objectives and the methodological approach, which will combine secondary source research across numerous literature fields, as well as empirical research in the form of interviews with experts in the fields of UCH law and marine governance. It then defines underwater cultural heritage (UCH) and examines some of its key values, before exploring the various direct and indirect threats which render its protection and management an important international objective. It also produces a brief timeline to explain international and regional efforts at ensuring its protection over the past half century, eventually culminating in the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention). The core features and principal achievements of the UNESCO Convention are explored and then it sets the context for the analysis in Chapters 2 to 5 on the difficulties that arise from enforcing the Convention through the paradigm of Westphalian law.

1. Introduction: Improving the Protection of Underwater Cultural Heritage by Transnational Governance

The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention) has been gradually growing global momentum and membership since coming into force in 2009.[1] Previous legal research appraising the UNESCO Convention has been predominantly focused upon its general ambiguity or its treatment of now well-trodden legal debates such as the laws of salvage, the irreconcilability of commerce with archaeological practices, or the sovereign immune status of sunken warships.[2] While such literature has adequately critiqued the UNESCO Convention from a superficially positivist perspective, there is a lack of literature evaluating the treaty's effectiveness in practice. In particular, little attention has been paid to the fact that the overarching objective of the treaty was to add substance to the existing duty among States

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1 (UNESCO Convention).
[2] See Chapters 2 and 3.

Parties of the United Nations 1982 Convention on the Law of the Sea (LOSC) to "cooperate" in the protection of underwater cultural heritage (UCH).[3] Looked upon critically, however, the Convention has merely repeated this ambiguous commitment between states.

This thesis takes a new approach by critiquing UCH law from a broader and more critical perspective, questioning its real efficacy in practice and examining issues with its implementation globally. Therefore, instead of criticising the substantive legal *rules* within the UNESCO Convention or the LOSC, as has been the preoccupation of much research up to this point, it focuses its aim more directly at the legal *system* within which those rules are developed and enforced, i.e., public international law. The overall aim of the study is to explore whether the weaknesses of the UNESCO Convention, qua multilateral and inter-state treaty, could be better addressed by the addition of rules, norms, regimes and actors operating at transnational scales ranging from the global, regional, national, and local levels. The focus of the chapters can therefore be broken into three main sections:

- ***Chapters 1 and 2: The International Legal Rules Protecting Underwater Cultural Heritage***

The aims of Chapters 1 and 2 are to introduce the issues surrounding the international protection of UCH and the traditional legal rules which have been used in its protection, i.e., national law, private international law, and public international law.

Chapter 1 explains and justifies the chosen methodology for addressing study's aim, which is focused particularly upon the synthesis of previously disjunct fields of secondary source literature, such as UCH law and policy, transnational law, legal pluralism, legal realism, integrated ocean management, global governance, collaborative governance, meta-regulation, and global public goods; as well as the undertaking of 11 interviews with expert respondents across UCH and marine governance fields in North-Western Europe as empirical evidence. It then introduces the definition of UCH and its various threats and values, before providing an introduction to the efforts to negotiate effective international rules in its protection.

[3] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397 (LOSC), Art. 303(1).

Chapter 2 then explores the UNESCO Convention in a bit more detail, highlighting how it may have done a suitable job of dealing with the main concerns at the time of it drafting, particularly relating to the sanction of treasure hunting through laws of salvage. However, it also highlights how the Convention failed to focus on the more indirect, incidental or illicit threats which are becoming an increasingly severe and frequent problem, such as looting, dredging, trawling, fishing, cable and pipe-laying, mining, energy generation and extraction, and offshore construction. Ultimately, by using a 'multiple-value' lens through which to view heritage, the chapter resolves the debate between seeing UCH as being subject to opportunism (as it has been viewed by treasure hunters) or preservationism (as viewed by archaeologists), arguing in favour of better long-term preservation, often preferably in situ.

- ***Chapters 3 to 5: The Weaknesses of the International Legal System***

Taking this forward, Chapters 3, 4 and 5 will more directly critique the international *system* for protecting UCH by going beyond a positivist and black-and-white analysis of the legal rules and, alternatively, appraising their development through inter-state bargaining and their cross-border enforceability.

Chapter 3 focuses on the fact that the very aim of the UNESCO 2001 Convention was to provide substance and meaning to an international agreement to 'cooperate' in the international protection of UCH, as widely subscribed to by most states through the LOSC. It argues that the political contest for power and jurisdictional authority between sovereign states in the context of UCH has boiled down to such a hortatory and ad hoc duty to cooperate. However, under the rubric of international law, such an equivocal commitment only requires an inefficient and passive type of cooperation, instead of an *active* form of cooperation requiring states to proactively pre-empt threats to UCH and to curtail certain excesses at the expense of their own economic advancement.

Chapter 4 then takes this forward and focuses on the consent-based nature of the international legal system and how, by the interoperation of the game theoretical concepts of free riding and Prisoner's Dilemma, public international law has proven itself to be weak at addressing state compliance with collective action goals which are for the global good, rather than for the national good. It argues that certain characteristics of UCH protection, as a multiple-value good, render its production prone to positive externalities, thus making it an undesirable investment of political energy, time, and resources by

national governments. It evidences this by pointing to numerous examples of poor state compliance with international commitments to protect UCH, as discovered through interviews and secondary research.

Chapter 5 then introduces the concepts of 'Westphalian sovereignty' and 'transnational law', before engaging in a critical assessment of the international law of the sea as a system for governing the ocean. Focusing on three particular characteristics of Westphalian sovereignty – absolutism, equality, and territoriality – it hopes to show that one of the key factors behind the poor enforcement and lack of effective governance regimes in the ocean is a result of a positivist approach to international law that considers nation states as only bound by the rules they agree to enforce against themselves and by which they agree to be bound. It then demonstrates that the rules devised for protecting UCH in the UNESCO Convention and the LOSC are characteristic examples of such vague and ambiguous inter-state laws, which will propagate the persistent challenges of compliance, normative, knowledge, geographical and regulatory 'gaps' in ocean management, especially in relation to protecting the marine historic environment as a global public good.

- ***Chapters 6 to 10: A Transnational Approach to the Protection of Underwater Cultural Heritage***

Chapters 6 to 10 then explore the solution to the strained system of inter-state law, as was evidenced in Chapters 3 to 5, in the form of a more transnational (multi-actor, multi-level and public-private hybrid) approach. This seeks to expand on the available norms and systems available for protecting UCH across the global framework 'beyond the state'. In particular, Chapters 6, 7, 8 and 9 each proceed by introducing theories and arguments in favour of increasing the governance role of private and public actors and norms at the *global*, *regional*, *national*, and *community* levels, respectively.

Chapter 6 explains how the chapters that follow will break up the proposed transnational governance approach into a multi-level (global-regional-national-community) frame. In doing so, it makes the connection between the increasingly coveted 'integrated' approach to governing the oceans and the study of transnational law and governance, before clarifying why it is beneficial to represent transnational governance through a multi-level governance frame. It then goes on to examine the potential value of promoting the influence of regimes, actors and institutions at the broader 'global' level, particularly

focusing on the increasing capacity and important function of public-private networks, NGOs, epistemic communities, pressure groups and stakeholders in steering or impacting regulation protecting UCH at the global level.

Chapter 7 then examines the 'regional-level' of transnational governance, first exploring the three main types of regionalisation: multilateral, supranational, and transnational. While the chapter discovers a surprising and unfortunate lack of existing research explicating the various benefits of regional-level integration in protecting collective interests, it does collate a summary of many key arguments and proposals towards this end. It shows how regionalism is particularly effective at addressing the collective action 'critical mass' and lowest common denominator issues experienced at the broader international level, highlighted in Chapters 4 and 5. It then looks at UCH protection more specifically, examining the future role of regional-level regimes and the political challenges to their achievement.

Chapter 8 provides a brief counter-perspective to the findings in Chapters 6, 7, 8 and 10, by providing various defences of the traditional system of national-level governance. It shows that national law has various democratic, legitimacy and familiarity advantages, which will make it both essential and indispensable to effective global governance. It therefore sets up the various strands for future research in this area, by considering the democracy, accountability and legitimacy challenges inherent in transnational governance.

Chapter 9 then looks more broadly, particularly at the local and subnational scales, at the private governance role of communities and stakeholders themselves. Introducing research which shows the capacities of communities to self-govern and to be co-governed in a manner which is more effective than traditional top-down regulation, it provides evidence that meta-regulation should be more frequently utilised to facilitate the power of communities themselves in the protection of global heritage. It demonstrates that, particularly through the provision of legislation, public-oriented property law and facilitated collaborative space, it is possible to create sufficient buy in, incentivisation or motivation for communities – including local and transnational networks of stakeholders – to craft more effective systems for protecting heritage than would otherwise be possible by command-and-control regulation. This leads to recommendations that future global, regional, national and local policy facing collective action issues in the marine

environment should include co-governance elements, which delegate some power and responsibility back to communities themselves.

Finally, Chapter 10 concludes by summarising all the arguments raised throughout Chapters 1 to 9, while also providing a residual defence for the ongoing role for traditional national-level governance (i.e., domestic law, private international law, and public international law) in the protection of UCH. It intends to argue – again with reference to primary and secondary research in the field of UCH law and management – that both national-level and transnational governance are in fact positively inter-related and that the promotion of one mechanism will assist in strengthening the quality of the other. It thus promotes the widespread ratification, implementation and promotion of multilateral frameworks, such as the UNESCO Convention; in parallel to more committed efforts to expand the role of NGOs, institutions, epistemic actors, corporations, individuals, and communities at the global, regional, and local level. Considering that national-level regulation has been the predominant focus in the past, it therefore argues that the expansion of regional regimes (whether by multilateralism, supranationalism, or pluralism), as well as the empowerment of private and public-private communities by co-management and collaborative governance, should therefore now be given greater priority and significance in the global agenda for UCH protection.

2. Protecting Underwater Cultural Heritage by Transnational Governance: A Methodology

(a) Methodology: Combined Literature Review and Expert Interviews

The research questions introduced in Section 1 – relating to the weaknesses of international law in protecting UCH and the potential advantages of adopting a more multiple-level approach – can be addressed with the use of evidence and research utilising a relatively simple methodology. Specifically, the fact that these questions have yet to be explored at all with regard to UCH, neither theoretically or practically, means that this study can provide an initial scoping on the research theme and introduce the theories in the form of an extended review, analysis and appraisal of existing secondary literature. For example, this study provides originality and new thinking in the field of international UCH policy by being the first to introduce and thoroughly examine theories and concepts such as global public goods, multiple-value heritage management, transnational law, legal pluralism, rational choice theory, global governance, transboundary marine spatial

planning, and collaborative governance into the context of submerged archaeology. Given that each one of these fields consists of a large body of existing primary and secondary research sources which have yet to be cross-matched with the body of research into UCH law and policy, there is more than sufficient material and new analyses which can be drawn from these existing resources and no need to go beyond this in order to answer the specific enquiry of the study.

Nevertheless, while a review of existing literature would have been sufficient to address the enquiries of this study (as set out above in Section 1), there are numerous advantages to also adopting a combined empirical approach to the study. This empirical element – in the form of expert interviews – supports and expands the originality and veracity of the argumentation, as well as more critically addressing any gaps in the existing bodies of literature. Furthermore, while the study opens new research pathways by being the first to apply these existing bodies of theoretical literature to UCH protection, the use of expert interviews can concept-test the findings and ensure that the conclusions drawn from the theory do match up with the practical reality. The empirical element therefore consists of a series of in-depth and semi-structured interviews with leading experts on either UCH policy or marine governance; where the former could confirm the accuracy of conclusions relating to effective UCH protection and its likely interaction with marine governance; and the latter could confirm the accuracy of conclusions relating to effective marine governance, informing the protection of UCH.

As the experts were intended to concept-test conclusions drawn from the analysis and synthesis of existing literature, it was decided that no more than 4 experts from each field – i.e., 4 experts in UCH policy and 4 experts in marine governance – would be needed to provide indorsement of the plausibility of theories raised and to adjudge whether hypotheses are in line with emerging policy. In the end, this target was exceeded, with the final study consisting of 4 experts in marine governance and 7 leading experts in UCH policy. It was also decided that, seeing as one of the core research questions is the potential role for regional-level governance and the enhanced transnationalisation of governance across subregional contexts, it would be prudent to avoid any potential bias by limiting the study to experts within one country and, rather, selecting experts with experience around a broader geographical region. The region chosen for an emphasis in the study was the Northern European ocean region and, principally, the experts with experience or knowledge of UCH or governance in the North Sea and Baltic Sea.

There are a number of reasons for this choice of region. Not only is Europe often regarded as a global leader in terms of effective and well-developed marine policy, but it is also a leading region for transboundary solutions crafted through detailed multilateral rules or supranational legislation.[4] As Jentoft and Knol recently said, if effective transboundary governance 'cannot be realized [in the North Sea], one would be hard-pressed to envision a situation in which it could.'[5] These seas are also home to many nations with a strong economic interest in offshore activities and who have already begun exploring or creating various multilateral, supranational and transnational systems of governance across regional seas.[6] Indeed, the BalticRIM project in the Baltic might be one of the world's foremost efforts to date in utilising transboundary marine spatial planning tools to protect submerged cultural heritage.[7] On top of this, research and expertise in marine archaeology and ocean governance in the North Sea and Baltic Sea is among the world's leading and the seas themselves are particularly rich in terms of globally significant UCH.[8] Yet, these same seas are regarded as increasingly crowded spaces, with an ever-growing list of competing and overlapping sectoral demands in an ever-shrinking space.[9]

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[4] Soma, K., van Tatenhove, J. and van Leeuwen, J., (2015), 'Marine Governance in a European Context: Regionalization, Integration and cooperation for Ecosystem-Based Management', 117 *Ocean & Coastal Management* 4-13; van Hoof, L., van Leeuwen, J. and van Tatenhove, J., (2012), 'All at Sea; Regionalisation and Integration of Marine Policy in Europe', 11 *Maritime Studies* 9-22; Freire-Gibb, L.C., Koss, R., Margonski, P., and Papadopoulou, N., (2014), 'Governance Strengths and Weaknesses to Implement the Marine Strategy Framework Directive in European Waters', 44 *Marine Policy* 172-178; Qiu, W. and Jones, P.J., (2013), 'The Emerging Policy Landscape for Marine Spatial Planning in Europe', 39 *Marine Policy* 182-190.

[5] Jentoft, S. and Knol, M., (2014), 'Marine Spatial Planning: Risk or Opportunity for Fisheries in the North Sea?', 12 *Maritime Studies* 13-28, at p. 13; Gilek, M., Hassler, M. and Jentoft, S., (2015), 'Marine Environmental Governance in Europe: Problems and Opportunities', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 249-264, Routledge (Abingdon), at p. 258.

[6] Jay, S., Alves, F.L., O'Mahony, C., Gomez, M., Rooney, A., Almodovar, M., Gee, K., de Vivero, J.L.S., Gonçalves, J.M., da Luz Fernandes, M. and Tello, O., (2016), 'Transboundary Dimensions of Marine Spatial Planning: Fostering Inter-Jurisdictional Relations and Governance', 65 *Marine Policy* 85-96, at pp. 85-86; Blæsbjerg, M., Pawlak, J.F., Sørensen, T.K. and Vestergaard, O., (2009), *Marine Spatial Planning in the Nordic Region - Principles, Perspectives and Opportunities*, Nordic Council of Ministers (Copenhagen), at p. 15.

[7] BalticRIM, 'Integration of Maritime Heritage in the Maritime Spatial Planning of the Baltic Sea', (at: http://www.submariner-network.eu/projects/balticrim; accessed 1 May 2019).

[8] Peeters, H., Murphy, P. and Flemming. N., (Eds.), (2009), *North Sea Prehistory Research and Management Framework (NSPRMF) 2009*, Rijksdienst voor het Cultureel Erfgoed (Amersfoort), at p. 7; Aznar, M.J., (2016), *Protecting UCH in EU Waters: A Legal Approach (2016-17)*, Report Outline for Grant from HFF, Honor Frost Foundation (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2017/02/Mariano-Aznar-Protecting-underwater-cultural-heritage-in-EU-waters-a-legal-approach-2016-2017.pdf; accessed 1 May 2019).

[9] Flatman, J., (2012), 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy', in *Archaeology in Society: Its Relevance in the Modern World*, M. Rockman and J. Flatman (Eds.), 167-192, Springer (New York), at p. 176; House of Lords, (2015), *The North Sea Under Pressure: Is Regional Marine Co-Operation the Answer?*, 10th Report of Session 2014–15, HL Paper 137, Authority of the House of Lords.

The focus on the Northern European seas thus resulted in opinions being drawn from experts with a suitable mix of principal nationalities across this region (5 Dutch, 2 German, 2 British, 1 Belgian, 1 Spanish), with many of the interviewees also having experience of working across national borders in this region.

The qualitative interviews were primarily conducted at a distance by teleconferencing technology, with the exception of two responses which were conducted by a detailed written response and follow-up queries by asynchronous email exchange. The content-rich nature of the interviews meant that visual and physical cues and responses of the interviewees were not important, and the most important information would be the spoken (or written) responses of the experts, which were transcribed into a written manuscript. The interviews were conducted in compliance with the University of Exeter's ethical rules, including the design of the questionnaire, the ancillary information provided to the interviewees, the rights of interviewees throughout the process, and the use of data.

Before the interview, all interviewees were given the same information and set of questions which would form the basis of discussions. This included questions about the effectiveness of the UNESCO Convention, the potential strengths and weaknesses of regional-level and local-level governance in protecting UCH, and the potential role and challenges of various governance approaches such as marine spatial planning, environmental impact assessments, policy networks, and public-private partnering. The interviews were therefore semi-structured, with these various questions forming the overall basis of discussion, with the interviewees being encouraged to raise and discuss any and all matters they felt were of relevance with regard to the study's area of focus and the overall aims of the research. The author of the study, who was the sole interviewer in all cases, also asked reflexive and reactive questions based on the feedback of the interviewees. This combined structure and flexibility allowed the interviewees to all address the same issues, while still being flexible to providing greater feedback in those areas of the research which were closer to their specific knowledge or experience.

(b) UCH Policy Interviewees

- Mariano J. Aznar

Mariano J. Aznar Gómez is Professor of Public International Law and International Relations at the Universitat Jaume I of Castellón.[10] Aznar has published extensively in the field of international law and particularly on the subject of UCH law and policy. He also has had numerous advisory roles and areas of responsibility for UCH planning and policy.

- Antony Firth

Director of Fjordr Ltd, a leading marine and historic environment consulting firm for heritage agencies and developers, and a former Head of Coastal and Marine at Wessex Archaeology Ltd.[11] In addition to sitting on Historic England's Expert Advisory Group, Firth is also a leading author and expert in the field, having published many reports, articles and outputs on all manner of marine archaeology matters.

- Ulrike Guérin

Programme Specialist and Secretary of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage. Guérin is the head of the UNESCO Secretariat of UCH, responsible for coordinating states parties and ensuring management and implementation of the UNESCO Convention.

- Thijs J. Maarleveld

Professor of Maritime Archaeology of the University of Southern Denmark and former Head of the Maritime Heritage of the National Service for Archaeological Heritage (ROB) in the Netherlands. Maarleveld is another world-renowned name in maritime archaeology, who has published widely on all issues relating to underwater heritage management. He was also a founding member of the International Committee on the Underwater Cultural Heritage (ICUCH), as a branch of the International Council on Monuments and Sites (ICOMOS), which has advised UNESCO extensively on heritage issues, as well as a chairman of the working group on UCH management at the Europae Archaeologiae Consilium, and representing Netherlands in several international fora and committees.[12]

[10] 'Aznar Gómez, Mariano J.', Universitat de València, (at: https://www.uv.es/uvweb/college/en/profile/aznar-gomez-mariano-j-1285950309813/PersExtern.html?id=1285964975788&idA=true; accessed 1 May 2019).
[11] 'About Fjordr', Fjordr Ltd, (at: http://www.fjordr.com/about-fjordr.html; accessed 1 May 2019).
[12] 'Thijs J. Maarleveld', Syddansk Universitet (SDU), (at: https://portal.findresearcher.sdu.dk/da/persons/tmaarleveld; accessed 1 May 2019).

- Martijn Manders

Head of the Maritime Programme for the Cultural Heritage Agency of the Netherlands government (RCE) and also a Professor of Maritime Archaeology at University of Leiden. Manders is another well-known scholar in this field and has published extensively on marine archaeological policy and UCH management.

- Hans Peeters

Assistant Professor of Archaeology at Gronigen University in the Netherlands. Peeters was the key founder of the North Sea Prehistory Research Management Framework and is still frequently consulted on matters relating to UCH management as planning across the North Sea as part of this network.[13]

- Mike Williams

Visiting Professor at University of Plymouth Law School and Marine Conservation and Policy Research Centre and former Honorary Professor at the Institute of Archaeology, University College London.[14] Another towering figure in the field of UCH law and policy, among numerous other relevant experiences and areas of responsibility, Williams has published extensively on the law relating to UCH and advised government departments and agencies, both in the UK and abroad, on marine and coastal law.

(c) Marine Governance Interviewees

- Susanne Altvater

Maritime planning and policy consultant with *s.Pro – sustainable projects GmbH* and member of the European MSP Platform. Among other experiences and roles in the field of marine governance and marine sustainability, Altvater is also in a leading role within the BalticRIM project in the Baltic Sea which is a leading example of a transboundary marine spatial planning pilot expressly focused on UCH planning.[15]

- Frank Maes

[13] Supra n. 8, Peeters, Murphy and Flemming.
[14] 'Who We Are', University of Plymouth, (at: https://www.plymouth.ac.uk/research/cornerstone-heritage/who-we-are; accessed 1 May 2019).
[15] 'Susanne Altvater, Ass.iur.', Ecologic Institute, (at: https://www.ecologic.eu/2502; accessed 1 May 2019); 'Susanne Altvater', European MSP Platform, (at: https://www.msp-platform.eu/team/susanne-altvater; accessed 1 May 2019).

Professor of Law, Head of the Department for European, Public and International Law, as well as Director of the Maritime Institute, at Ghent University.[16] Maes has authored or co-authored over 250 outputs in the field of international law, with a particular expertise in maritime law and governance. While marked as a 'marine governance' expert for this study, he also has an expert knowledge of UCH policy.

- Erik Ooms

Project Manager on both the NorthSEE and Baltic LINes MSP projects, which are leading pilots on transboundary marine planning in the Northern European context.[17] Ooms also has an MSc in European Spatial Planning and Regional Development and is an active team member on the European MSP Platform.

- Leo De Vrees

Senior Advisor at the Dutch Ministry of Infrastructure and Water Management (Rijkswaterstaat), with a particular responsibility for strategic environmental assessments and marine spatial planning in the North Sea. De Vrees was also previously Policy Advisor under the EU Directorate-General for Environment, playing a role in the development and implementation of the EU Marine Strategy Framework Directive.

(d) The Study Approach

The approach of this study is highly exploratory, analytical and discursive. In every part of the study – from introducing the subject in Chapter 1, critiquing it in Chapters 2 to 5, making and evaluating recommendations in Chapters 6 to 10 – the viewpoints of the experts have been integrated into the study, with their responses being referenced or quoted in combination with secondary evidence. While the core questions outlined above have provided an undergirding to the entire theoretical analysis, there are numerous other issues and questions which are either raised and addressed as the narrative of the study progresses, which are signposted as areas which are covered elsewhere, or which would be suitable for future enquiry.

[16] 'Prof. Dr. Frank. Maes', Rolin Jaequemyns International Law Institute (Ghent), (at: http://www.grili.ugent.be/members/faculty/prof-dr-frank-maes; accessed 1 May 2019).
[17] 'Erik Ooms', European MSP Platform, (at: https://www.msp-platform.eu/team/erik-ooms; accessed 1 May 2019).

3. The Many Threats and Values of Underwater Cultural Heritage

(a) The Need for Underwater Cultural Heritage Protection

It is widely accepted that the protection of UCH formed something of an afterthought during the negotiations over the LOSC.[18] Given its pivotal role in delegating primary rules of ocean governance between states, the LOSC is frequently regarded as a 'constitution for the oceans'.[19] However, it was subsequent to the conclusions of the UNCLOS III negotiations between 1973 and 1982 that the protection of UCH experienced a large surge in global concern, demanding firm-footed legislative action.[20] This was particularly a result of vastly improved technology providing deeper access into the ocean at considerably less cost,[21] as well as a number of controversial global headlines on the salvage of famous wrecks such as the SS *Central America*,[22] *Geldermalsen*,[23] or CSS *Alabama*.[24]

Related legal cases are increasingly common in this post-UNCLOS period. For example, RMS *Titanic* has been subject to endless court cases and controversies since its discovery in 1985.[25] Another famous liner, RMS *Lusitania*, has also been the subject of court

[18] O'Keefe described UCH as having a 'low priority' in the UNCLOS negotiations (O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at p. 12); Caflisch referred to the LOSC's consideration of UCH as only 'cursory' (Caflisch, L., (1982), 'Submarine Antiquities and the International Law of the Sea', 13 *Netherlands Yearbook of International Law* 3-32, at p. 6); Watters, D.R., (1983), 'The Law of the Sea Treaty and Underwater Cultural Resources', 48(4) *American Antiquity* 808-816.

[19] Koh, T.T.B, (1982), Statement of the Ambassador, President of the Conference at Final Session in Montego Bay, 11 December 1982, Reprinted in: United Nations, (1983), *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea,* United Nations (New York), at p. xxxiiii.

[20] The development of UNCLOS is regularly referred to as having taken place over three periods of negotiations, with UNCLOS I (1956-1958), UNCLOS II (1960) and UNCLOS III (1973-1982).

[21] Nafziger, J.A.R., (1999), 'The Titanic Revisited', 30(2) *Tulane Journal of Maritime Law and Commerce* 311-330, at p. 312; Firth, A., (2015), *The Social and Economic Benefits of Marine and Maritime Cultural Heritage: Towards Greater Accessibility and Effective Management*, Fjodr Ltd, Honor Frost Foundation (London), (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2015/09/HFF_Report_2015_web-4.pdf; accessed: 1 May 2019), at p. 15.

[22] Winter, M., (2014), 'Gold Worth Millions Recovered from 1857 Shipwreck', 17 July 2014, *USA Today*, (at: http://www.usatoday.com/story/news/nation/2014/07/17/shipwreck-atlantic-gold-rush/12800743/; accessed 1 May 2019).

[23] Miller, J., (2010), 'Antique Collectors' Corner: Cargo Salvaged from Shipwrecks', 11 March 2010, *The Telegraph*, (at: http://www.telegraph.co.uk/lifestyle/interiors/7420034/Antique-collectors-corner-cargo-salvaged-from-shipwrecks.html; accessed 1 May 2019); Miller, G.L., (1992), 'The Second Destruction of the Geldermalsen', 26(4) *Historical Archaeology* 124-131.

[24] Zeller, B., (1987), 'US Hopes to Emerge the Winner in Battle to Salvage Warship', 3 November 1987, *Journal of Commerce*, (at: http://www.joc.com/maritime-news/us-hopes-emerge-winner-battle-salvage-warship_19871103.html; accessed 1 May 2019).

[25] Cases in the United States have included: *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F.Supp2d 714 (E.D. Va. 1996); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 9 F. Supp. 2d 624 (E.D. Va. 1998); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, No. 2:93cv902 (E.D. Va. 1999); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006); *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 531 F.Supp.2d 691 (E.D. Va. 2007); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F.Supp.2d 784 (E.D. Va. 2010). See BBC News,

intervention in each the United States, Ireland and Britain.[26] Salvage claims relating to treasure-laden Spanish galleons carrying gold and bullion from the New World have also been frequent headlines in the media, such as the *Nuestra Señora de Atocha* and *Nuestra Señora de las Mercedes*.[27] Furthermore, especially more so today, there are growing news reports detailing the looting of metals and other materials from sunken 20th Century warships, often protected as important military gravesites.[28] Given the multitude of growing threats to this finite and irreplaceable resource from diverse activities (see subsection 2), the United Nations Educational, Scientific and Cultural Organization (UNESCO) was therefore consulted by the archaeological community in 1995 on the feasibility of an international legal instrument aimed at the protection of UCH as common heritage of humanity.[29] The resulting 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (the "Convention") entered into force in January 2009 with its 20th instrument of ratification.[30]

'Titanic Salvage Hits Storm of Protest', 14 August 1998, (at: http://www.news.bbc.co.uk/1/hi/sci/tech/150962.stm; accessed 1 May 2019); Marschall, K., (1995) 'A Titanic Task: Confronting the Controversy of Salvaging', November 1995, 24(2606) *USA Today Magazine* 50-51; Aznar, M.J. and Varmer, O., (2013), 'The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection', 44(1) *Ocean Development & International Law* 96-112, at p. 97.

[26] *Bemis v. RMS Lusitania*, 884 F. Supp. 1042 (E.D. Va. 1995); *Pierce and Another v. Bemis and Others (The Lusitania)*, [1986] QB 384, [1986] 1 All ER 1011; Kingston, W., (2015), 'Ireland Spent $1 Million Preventing Research into Lusitania', November/December 2015, 6(23) *History Ireland*, (at: http://www.historyireland.com/volume-23/ireland-spent-1-million-preventing-research-into-lusitania; accessed 1 May 2019).

[27] *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011).

[28] E.g., BBC News, (2018), 'UK Investigates WW2 Shipwreck Looting Claims', 19 August 2018, *BBC News*, (at: https://www.bbc.co.uk/news/uk-45238158; accessed: 1 December 2018); Lamb, K., (2018), 'Lost Bones, A Mass Grave and War Wrecks Plundered off Indonesia', 28 February 2018, *The Guardian*, (at: https://www.theguardian.com/world/2018/feb/28/bones-mass-grave-british-war-wrecks-java-indonesia; accessed: 1 December 2018); Brean, J., (2017), ''It's Grave Robbing': Treasure Hunters Suspected to have Looted Infamous 1915 Shipwreck', 5 December 2017, *National Post*, (at: https://www.nationalpost.com/news/canada/its-grave-robbing-treasure-hunters-suspected-to-have-looted-infamous-1915-shipwreck; accessed: 1 December 2018); Holes, O., (2017), 'Sunken Australian Warship HMAS Perth Ransacked by Illegal Scavengers', 5 June 2017, *The Guardian*, (at: https://www.theguardian.com/australia-news/2017/jun/05/sunken-australian-warship-hmas-perth-ransacked-by-illegal-scavengers; accessed: 1 December 2018); Middleton, J. and Neal, C., (2018), 'Shipwreck Looters Who Plundered Historical Artefacts from Royal Navy Warship at Bottom of the Sea Jailed', 22 June 2018, *The Mirror*, (at: https://www.mirror.co.uk/news/uk-news/shipwreck-looters-who-plundered-historical-12771186; accessed: 1 December 2018); Mema, B., (2018), 'Looters Plunder Albania's Sunken Treasures', 18 November 2018, *Phys.Org*, (at: https://www.phys.org/news/2018-11-looters-plunder-albania-sunken-treasures.html; accessed: 1 December 2018).

[29] UNESCO, (1995), *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, 12 March 1995, Executive Board, 146th Session, UN Doc. 146 EX/27, UNESCO (Paris).

[30] The 20th instrument was brought by Barbados in October 2008. See list of states parties at: 'Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001', UNESCO, (at: http://www.unesco.org/eri/la/convention.asp?KO=13520; accessed 1 May 2019).

(b) Defining "Underwater Cultural Heritage"

The term "underwater cultural heritage" is a relatively recent one. Early references include terms such as 'objects of archaeological or historical significance' under Article 149 of the LOSC and 'archaeological heritage … situated … under water' under the 1992 European Convention on the Protection of the Archaeological Heritage.[31] Contemporaneously, the term "cultural heritage" has in recent years developed its own significance and meaning and has come to be the preferred term to broadly capture a host of objects, landscapes, buildings, social practices and identities, and stretching to the abstract and intangible.[32] At one time, as within the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,[33] or the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[34] the reference to cultural heritage was only to cultural "property". The substitution of 'heritage' for 'property' represents the move away from an object-oriented approach which merely identifies the economic and tangible aspects of property, towards the broad perspective inclusive of all these diverse derivatives of "heritage".[35]

The addition of the word 'underwater', first emerging from the Council of Europe's 1978 Recommendation,[36] is a logical step. 'Underwater' has in a sense been adopted from the field of 'underwater archaeology', wherein 'maritime archaeology' or 'nautical archaeology' have connotations to ships, seafaring and naval history, and 'marine archaeology' denotes archaeology in and around the sea, but is neglectful of inland sites; and so the term 'underwater archaeology' is regarded as the broader and more inclusive

[31] European Convention on the Protection of the Archaeological Heritage (Revised), (adopted 16 January 1992 (Valletta), in force 25 May 1995), Council of Europe, ETS No. 143 (hereafter 'Valletta Convention'), Art. 1(3).

[32] Hoffman, B.T. (Ed.), (2006), *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press (Cambridge); Blake, J., (2015), *International Cultural Heritage Law*, Oxford University Press (Oxford).

[33] Convention for the Protection of Cultural Property in the Event of Armed Conflict, (adopted 14 May 1954, in force 7 August 1956), UNESCO, 249 UNTS 240.

[34] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (adopted 14 November 1970, in force 24 April 1972), UNESCO, 823 UNTS 231.

[35] Prott, L.V. and O'Keefe, P.J., (1992), ''Cultural Heritage' or 'Cultural Property'?', 1(2) *International Journal of Cultural Property* 307-320; Frigo, M., (2004), 'Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?', 86(854) *International Review of the Red Cross* 367-378; Convention for Safeguarding of the Intangible Cultural Heritage, (adopted 17 October 2003, in force 20 April 2006), UNESCO, 2368 UNTS 1.

[36] Council of Europe, (1978), 'Underwater Cultural Heritage', Recommendation 848, Parliamentary Assembly, 18th Sitting, 4 October 1978, (at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14882; accessed 1 May 2019).

definition.[37] Thus, as with underwater archaeology, 'underwater' does not merely cover objects on the seabed, but includes heritage found in rivers, lakes, canals, in intertidal zones, as well as partially submerged objects. Despite UCH being most commonly associated with shipwrecks, its definition is intended to also be broadly inclusive of any submerged cultural manmade object, be that discarded or lost objects, aircraft and other vessels,[38] structures and buildings,[39] as well as prehistoric objects and sites from classical antiquity,[40] such as the now-submerged Mesolithic dwellings in the Taiwan Strait,[41] to inland Bronze Age crannog settlements across Northern Europe,[42] to ancient submerged harbours and town buildings.[43] There were suggestions during the drafting of the UNESCO Convention that, as with natural heritage, cultural heritage could also be inclusive of landscapes.[44] However, given the term's lack of precision, as well as the potential for misuse by encircling swathes of seabed for protection, this proposal was eventually shelved.[45]

In the end, the UNESCO Convention negotiations led to a reasonable definition of UCH, which was defined under Article 1 as:

[37] Delgado, J.P. and Staniforth, M., (2002), 'Underwater Archaeology', in *Archaeology: Volume 1*, Encyclopedia of Life Support Systems (EOLSS), D.L. Hardesty (Ed.), 227-248, Developed under the Auspices of the UNESCO, Eolss Publisher (Paris), at pp. 227-229.
[38] E.g. Fix, P.D., (2011), 'From Sky to Sea: The Case for Aeronautical Archaeology', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 989-1009, Oxford University Press (Oxford).
[39] E.g. Rogers, A., (2013), 'Social Archaeological Approaches in Port and Harbour Studies', 8(2) *Journal of Maritime Archaeology* 181-196.
[40] E.g. Firth, A., (2011), 'Submerged Prehistory in the North Sea', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 786-808, Oxford University Press (Oxford).
[41] Chang, K.C., (1989), 'The Neolithic Taiwan Strait', 6 *Kaogu* 541-569.
[42] Guérin, U. and Raish, C., (2009), *The Interest of the Ratification of the Underwater Cultural Heritage Convention for Landlocked Countries*, Secretariat of the 2001 Convention on the Protection of the Underwater Cultural Heritage, UNESCO, (at: http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/images/Landlocked_01.pdf; accessed 1 May 2019), at p. 3.
[43] Marchant, J., (2009), 'Drowned Cities: Myths and Secrets of the Deep', *New Scientist*, November 2009, (at: https://www.newscientist.com/round-up/drowned-cities-myths-secrets-of-the-deep/; accessed 1 May 2019).
[44] UNESCO, (1997), *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage, 151st Session, 12 March 1997, Paris*, UN Doc. 151 EX/10, UNESCO (Paris), at Annex I, para. 9 and opinions of Tunisia, Republic of Korea and Venezuela delegates, at pp. 3, 5 and 6; c.f. Tuddenham, D.B., (2010), 'Maritime Cultural Landscapes, Maritimity and Quasi Objects', 5(1) *Journal of Maritime Archaeology* 5-16.
[45] Ibid, UNESCO, Paras. 9-10. Dromgoole also reports how the UNESCO Convention would have been an unsuitable instrument to handle such a multidimensional challenge (Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 89).

> ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
>
> (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
>
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
>
> (iii) objects of prehistoric character.’[46]

The definition also goes on to exclude certain specific manmade objects that serve a modern-day technical purpose such as cables, pipelines and other industrial installations.[47] While this is regarded as a firm definition in law, it should be immediately clear that various aspects which have been subject to critique.[48] In particular, three such criticisms have been: the time limited period of 100 years since submersion; the requirement of having ‘a cultural, historical or archaeological character’; and, conversely, the lack of a significance criterion which could lead to an overly broad definition of what constitutes archaeological heritage.

It has been argued that the lack of significance criterion could mean that all feasible traces of human existence over 100-years-old are included, including garbage or discarded fragments of objects.[49] In fact, the belief in the Convention’s over-inclusiveness was a

[46] Supra n. 1, UNESCO Convention, Art. 1(a).

[47] Supra n. 1, UNESCO Convention, Art. 1(b) and (c). Given statements made on behalf the pipeline and cable-laying industries regarding the removal of disused cables (International Cable Protection Committee, (2016), ‘ICPC Achievements’, July 2016, ICPC, (at: http://www.iscpc.org/documents/?id=2050; accessed 1 May 2019), as well as an awareness that such activities are already regulated under the LOSC and via the IMO (e.g., International Maritime Organization, (1989), *Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone*, Resolution A 672(16), 10 October 1989, IMO (London)) it was decided to remove them from the purview of the Convention. Nevertheless, there is perhaps an argument that any cables or pipelines over 100 years old are likely to cross over into the bounds of “UCH”, similar to the regime foreseen for industrial installations under Article 1(c).

[48] See generally: Forrest, C., (2002), ‘Defining Underwater Cultural Heritage’, 31(1) *The Journal of Nautical Archaeology* 3-11.

[49] Bederman, D.J., (1998), ‘The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal’, 30 *Journal of Maritime Law and Commerce* 331-354, at pp. 332-333; Bautista, L., (2013), ‘Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law’, in *Securing the Ocean for the Next Generation: Papers from a Law of the Sea Institute*, UC Berkeley-Korea Institute of Ocean Science and Technology Conference (May 2012, Seoul), H. Scheiber and M. Kwon (Eds.), Berkeley Law (Berkeley), (at: https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2491&context=lhapapers; accessed: 18 November 2018), at pp. 23-24; Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.

key objection of several countries abundant with UCH, such as the United Kingdom, who rejected the final draft on the basis, inter alia, that it would allocate them the exceedingly burdensome task of protecting an estimated 10,000 wrecks in their territorial waters.[50] However, when it comes to the protection of a vulnerable, fragile, and non-renewable resource, it is better to be over-inclusive with disagreements over the *exceptions*; rather than under-inclusive with disputes over the *potential additions*.[51] Furthermore, despite the concerns raised during negotiations,[52] the definition could be said to include a significance criterion. The inclusion of 'cultural, historical or archaeological *character*' makes clear that the Convention does not apply to *all* traces of human existence over 100 years old, but that there is a minimum base level of characteristics required.[53] With regard to the objection by the UK that it faced onerous responsibilities, it has also become largely accepted that a key distinction in the Convention is between stricter state responsibilities in matters 'directed at' UCH, with minimised aspirational duties regarding activities 'indirectly affecting' UCH.[54] Finally, some have questioned the fairness of defining UCH based on characteristics ascribed to it solely by the archaeological or historical community, considering the other multifarious communities wishing to similarly protect

[50] Foreign & Commonwealth Office, (2001), *UNESCO Convention on the Protection of the Underwater Cultural Heritage: UK Explanation of Vote*, FCO (London); The exact number of wrecks in UK territorial waters remains uncertain, with estimates since the UNESCO negotiations including less than 1,000 wrecks which qualify as UCH under the UNESCO Convention, to a total of 40,000 wrecks of all standards in English waters alone, and a 2010 survey concluding that there are 7,900 known wrecks with 2,800 of these meeting the UNESCO definition (see Roberts, P. and Trow, S., (2002), *Taking to the Water: English Heritage's Initial Policy for the Management of Maritime Archaeology in England*, English Heritage (London), at pp. 5-6; Firth, A., (2011) 'Underwater Cultural Heritage off England: Character and Significance', in *Protection of Underwater Cultural Heritage in International Waters adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House November 2010*, R.A. Yorke (Ed.), 15-22, Joint Nautical Archaeology Policy Committee (Horsham).

[51] Coleman, P., (2013), 'UNESCO and the Belitung Shipwreck: The Need for a Permissive Definition of Commercial Exploitation', 45(4) *George Washington International Law Review* 847-874, at p. 855; Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 423.

[52] According to Forrest, delegates from each Japan, Sweden, Egypt, US and UK all voiced concern over the lack of any significance criterion (Forrest, C., (2002), 'A New International Regime for the Protection of Underwater Cultural Heritage', 51(3) *International Comparative Law Quarterly* 511-554, at p. 524; Supra n. 49, Bederman, at p. 333.

[53] Dromgoole, S., (2003), '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 18(1) *International Journal of Marine and Coastal Law* 59-108, at p. 64; Supra n. 51, Carducci, at p. 423; c.f. 'Whether the phrase … actually adds anything to the definition is doubtful.' (Supra n. 18, O'Keefe, at p. 34). Indeed, even marine garbage could be of archaeological interest, thus making the definition of UCH an intriguingly complex and value-driven assessment (Arnshav, M., (2014), 'The Freedom of the Seas: Untapping the Archaeological Potential of Marine Debris', 9(1) *Journal of Maritime Archaeology* 1-25).

[54] UK UNESCO 2001 Convention Review Group, (2014), *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom – Final Report*, United Kingdom National Commission for UNESCO (London), (at: https://www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf; accessed: 18 November 2018), at pp. 58-68; Supra n. 50, Firth, 18-19; Supra n. 51, Carducci, at pp. 423-424.

it as a fishery, recreational, commercial or cultural resource.[55] However, as will be elucidated in Chapter 2, given that archaeologists are the most protective and least consumptive of UCH under a multiple-use model, it is logical that their more preservationist stance might establish the threshold on which to adjudicate significance.[56]

(c) The Value of Underwater Cultural Heritage

It is crucial that we protect this fragile and non-renewable resource for the many important values it provides. This includes the historical information which is stored within all underwater archaeological sites. Behind every single shipwreck, submerged human dwelling, vessel or object, is a hugely important human story, as well as a repository of academic theories and scientific data, ready to be decoded and disseminated.[57] Shipwrecks are therefore often regarded by archaeologists as 'time capsules': moments paused in time with the entire layout and context preserved in suspense.[58] It is this archaeological, historical and informational value of our global submerged heritage that has spearheaded the international movement to ensure its proper care and management.

Less noted, however, and as is also explored in more critical detail in Chapter 2, is how UCH also possesses great cultural, social, economic, scientific and intrinsic values. Culturally, it helps us identify with the cultures of our past and understand why certain cultures are the way they are today,[59] as well as assist in understanding early migrations and cultural interchanges.[60] Through underwater sites we can understand the society and culture of early people and civilisation, as well as the roles and activities of sea-going communities, sailors and passengers.[61] Significantly, we can learn where many objects,

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[55] Supra n. 49, Bautista, at p. 24; Supra n. 49, Bederman, at p. 354.
[56] See Chapter 2.
[57] Bass, G.F., (2011), 'The Development of Maritime Archaeology', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 3-24, Oxford University Press (Oxford); Varmer, O., (1999), 'The Case Against the "Salvage" of the Cultural Heritage', 30(2) *Journal of Maritime Law and Commerce* 279-302, 287-291.
[58] Bowens, A., (Ed.), (2008), *Underwater Archaeology: The NAS Guide to Principles and Practice*, 2nd Edn, Nautical Archaeological Society, Wiley-Blackwell (New Jersey), at pp. 16-17.
[59] E.g. Agius, D.A., Cooper, J.P., Semaan, L., Zazzaro, C. and Carter, R., (2016), 'Remembering the Sea: Personal and Communal Recollections of Maritime Life in Jizan and the Farasan Islands, Saudi Arabia', 11(2) *Journal of Maritime Archaeology* 127-177, at pp. 167-171.
[60] Farr, H., (2006), 'Seafaring as Social Action', 1(1) *Journal of Maritime Archaeology* 85-99; Dobbs, C., (2008), 'Heritage Microbiology, Science and the *Mary Rose*: What are we Trying to Achieve?', in *Heritage Microbiology and Science: Microbes, Monuments and Maritime Materials*, E. May, M. Jones and J. Mitchell, J. (Eds.), 3-10, Royal Society of Chemistry (London), at p. 6.
[61] Ransley, J., (2011), 'Maritime Communities and Traditions', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 879-906, Oxford University Press (Oxford); Dolwick, J.S., (2008), 'In Search of the Social: Steamboats, Square Wheels, Reindeer and Other Things', 3(1) *Journal of Maritime Archaeology* 15-41; Domingues, F.C., (2011), 'Maritime History and Maritime

rituals, languages, skills and technologies around the world travelled from and to.[62] There is also a scientific value in underwater sites in and of themselves, in that they represent rare and largely under-researched chemical and biological environments, where the long-term preservation and degradation of countless materials, in various types of underwater environment, needs greater scientific research.[63] Furthermore, in understanding how submerged manmade objects have inadvertently created life-abundant artificial reefs.[64]

There is great human value in our historic marine heritage. Not just in our connection with our ancestors, or with the storytelling power of shipwreck, castaways, pirates, trade, slave ships, deportations, emigrations, heroic warfare, exploration and disaster, but with the innate value we place upon protecting and preserving all that is "us".[65] We all understand the human value in treating the human remains of those condemned to the depths with utmost respect and regard wrecks of maritime disasters with the same sanctitude as burial grounds.[66] Underwater sites also represent significant economic value: not just the high market value of cultural artefacts, or the salvage value of materials and cargo, but more so their in situ value from tourism and recreational activities such as wreck diving, dive trails, glass-bottom and submersible-boat tours, or virtual wreck tours.[67] Finally, there is an innate value in protecting our underwater heritage for its aesthetic, unique and totally irreplaceable qualities as a matter of course.

Archaeology', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 907-916, Oxford University Press (Oxford), at p. 912.

[62] Supra n. 60, Farr; Chirikure, S., Sinamai, A., Goagoses, E., Mubusisi, M. and Ndoro, W., (2010), 'Maritime Archaeology and Trans-Oceanic Trade: A Case Study of the Oranjemund Shipwreck Cargo, Namibia', 5(1) *Journal of Maritime Archaeology* 37-55.

[63] E.g. Oxley, I., (2008), 'The Investigation of the Factors That Affect the Preservation of Underwater Archaeological Sites', in *Maritime Archaelogy: A Reader of Substantive and Theoretical Contributions*, L.E. Babits (Ed.), 523-530, Springer (New York); Moore, J.D., (2015), 'Long-Term Corrosion Processes of Iron and Steel Shipwrecks in the Marine Environment: A Review of Current Knowledge', 10(2) *Journal of Maritime Archaeology* 191-204; Overfield, M.L. and Symons, L.C., (2009), 'The Use of the RUST Database to Inventory, Monitor, and Assess Risk from Undersea Threats', 43(4) *Marine Technology Society Journal* 33-40.

[64] Hiscock, K., Sharrock, S., Highfield, J. and Snelling, D., (2010), 'Colonization of an Artificial Reef in South-West England—ex-HMS 'Scylla'', 90(1) *Journal of the Marine Biological Association of the United Kingdom* 69-94; Perkol-Finkel, S., Shashar, N. and Benayahu, Y., (2006), 'Can Artificial Reefs Mimic Natural Reef Communities?', 61(2) *Marine Environmental Research* 121-135.

[65] E.g. See the Preamble to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 10 October 2005, in force 18 March 2007), 2440 UNTS 311, which expresses at length the human value of cultural diversity; Taylor, K., (2004), 'Cultural Heritage Management: A Possible Role for Charters and Principles in Asia', 10(5) *International Journal of Heritage Studies* 417-433, at p. 426.

[66] Jacobsson, M. and Klabbers, J., (2000), 'Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia', 69(3) *Nordic Journal of International Law* 317-332; Harris, J.R., (2001), 'The Protection of Sunken Warships as Gravesites at Sea', 7(1) *Ocean and Coastal Law Journal* 75-130.

[67] Dunkley, M. and James, A., (2015), *Accessing England's Protected Wreck Sites: Guidance Notes for Divers and Archaeologists*, Historic England (London), at p. 18; Supra n. 21, Firth; Hall, J.L, (2011), 'Things, Inc.: A Case for *In Situ* Application', in *Maritime Law: Issues, Challenges & Implications (Laws and Legislation)*, J.W. Harris (Ed.), 27-52, Nova Science Publishers (New York), at pp. 48-50;

(d) The Threats to Underwater Cultural Heritage

It is useful to understand the threats to UCH as divided between those which can be regulated specifically as activities directed at UCH – namely salvage, removal, regulated access, or archaeological studies – and those which are regulated more indirectly, such as looting, vandalism, damage, pollution, construction and development, fishing, climate change, and naturally occurring damage. All these secondary indirectly regulated threats are therefore incidental, unauthorised or unanticipated in nature. This distinction is important because, as is shown in Chapter 2, the UNESCO Convention has only addressed regulation of activities directed at UCH, being salvage and substandard archaeology. By contrast, it does very little to address the ever-growing and increasingly critical list of incidental and unpredictable threats.

i. Directly regulated threats to underwater cultural heritage

- Salvage and the Law of Finds

As explored further in Chapter 2, one of the most prominent threats to UCH has been the use of centuries-old maritime laws to obtain a reward for recovering artefacts, treasures and valuable cargoes and returning them into the stream of commerce. This doctrine, along with the similar doctrine of the law of finds, has been preserved, particularly within common law legal systems, from its ancient roots in the maritime laws of admiralty. Unfortunately, while salvage law remains a suitable system for rewarding a niche commercial sector of the maritime community undertaking professional work retrieving recently lost wreck and cargo, it is a wholly unsuitable system for managing underwater archaeological sites which demand long-term preservation for public value and archaeological research.[68]

Unfortunately, therefore, the 1970s to 1990s witnessed the propulsion to global fame and widespread admiration of the riches of treasure hunters who were "salvaging" historic wrecks laden with treasure, such as Mel Fisher, Mike Hatcher, Robert Marx and Edward Lee Spence. Although there remain several such examples, one of the more notorious

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Throckmorton, P., (2008), 'The World's Worst Investment: The Economics of Treasure Hunting with Real-Life Comparisons', in *Maritime Archaelogy: A Reader of Substantive and Theoretical Contributions*, LE. Babits (Ed.), 75-84, Springer (New York); Supra n. 44, UNESCO, at para. 59; UNESCO, (2013), *The Benefit of the Protection of Underwater Cultural Heritage for Sustainable Growth, Tourism and Urban Development*, UNESCO (Paris) (at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UCH_development_study_2013.pdf; accessed 1 May 2019).

[68] See Chapter 2.

treasure salvage companies in recent times has been Odyssey Marine Exploration (OME), who have been the subject of numerous television documentaries, as well as involved in a number of controversial cases relating to the commercial recovery of UCH.[69] Furthermore, the threat from salvage does not just relate to organised treasure hunting operations, but also to general pilfering by a small minority of recreational divers and other maritime stakeholders. Depending on the legal system, such opportunists have a number of angles by which they can profit from such activities, either by keeping the looted goods or selling them on the black market (see 'Looting' below), or obtaining financial reward in those countries still recognising commercial salvage as possible on archaeological sites, such as in the United Kingdom.[70]

Private individuals and commercial salvage companies are not the only perpetrators. The UK Government itself received significant worldwide criticism when it entered into a commercial salvage agreement with OME to share in the spoils of an excavation of HMS *Victory* (1744) in the English Channel.[71] The first-rate ship was one of the most famous and feared of Britain's 18th Century Navy before her sinking in the seas off the Channel Islands laden with an estimated £500m worth of gold coins, along with 1,100 men and over 100 giant bronze cannon, while en route back from fighting in the Tagus Estuary, Portugal.[72] The arrangement between the UK Ministry of Defence (MOD) and OME to undertake an "archaeological" recovery of the site and share profits from raising the gold caused controversy, given its prima facie conflict with values of the UNESCO Convention and its principles.[73] As at writing, this case is going towards a judicial review in the English High Court, wherein we are facing a showdown between OME and the archaeological community.[74]

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[69] Odyssey Marine Exploration (at: https://www.odysseymarine.com/; accessed: 1 May 2019); Temiño, I.R., (2017), 'The Odyssey Case: Press, Public Opinion and Future Policy', 46(1) *International Journal of Nautical Archaeology* 192-201.

[70] Martin, J.B. and Gane, T., (2019), 'Weaknesses in the Law Protecting the United Kingdom's Remarkable Underwater Cultural Heritage: A Call for Modernisation and Reform', *Journal of Maritime Archaeology* (Forthcoming).

[71] Dromgoole, S., (2006), 'United Kingdom', in *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, 2006, (Dromgoole, S., Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 329.

[72] Howard, F., (1979), *Sailing Ships of War 1400-1860*, 1979, Conway Maritime Press (Greenwich), at p. 182.

[73] Supra n. 71, Dromgoole, at p. 340; Shute, J., 'Tory Lord Defends the Treasure Hunt for HMS Victory', *The Telegraph*, 15 February 2015, (at: http://www.telegraph.co.uk/history/11411508/Tory-Lord-defends-the-treasure-hunt-for-HMS-Victory.html; accessed 1 May 2019).

[74] Hussain, D., (2019), 'Wreck of 300-Year-Old HMS Victory that Pre-Dated Lord Nelson's Famous Flagship is Still Tied Up in a Legal Wrangle Over Efforts to Raise it a Decade After it was Discovered 50 Miles off Plymouth', *The Daily Mail*, 15 February 2019, (at: https://www.dailymail.co.uk/news/article-6710209/Wreck-300-year-old-HMS-Victory-tied-legal-wrangle-efforts-raise-it.html; accessed 1 May 2019).

Another example is the much-reported legal contestation between US salvage company, Sea Search Armada Inc., and the Colombian government. In 2015, Colombia announced the "discovery" of the *San José* wreck in what they regard as their territorial waters – although it is in fact sitting on their continental shelf in what is widely regarded as international waters.[75] This archaeologically significant wreck represents a mass gravesite where 600 crew and passengers immediately sank to their deaths following a calamitous munitions explosion aboard the 60-gun Spanish galleon, during Wager's Action in 1708 during the Spanish War of Succession.[76] It is now being guarded by the Colombian Navy with the discernible intent of commercially exploiting a gigantic cache of gold and jewels which she was carrying back from Peruvian and Bolivian colonies, estimated to be worth between $4 billion to $7 billion.[77] The ship's coordinates were handed to the Colombian government as far back as 1982 by Sea Search Armada, who proposed to split the spoils of her loot equally in accordance with a newly promulgated Colombian law. Evidently the Colombian government is not willing to share after all.[78]

- Substandard Archaeology

The other principal threat to UCH arises from activities directed at UCH has been the problem of substandard archaeology, such as recovery or excavation projects which are carried out prematurely or with a generally deficient research plan which fails to properly record archaeological information or properly care for recovered materials. This threat is also closely interlinked with the threat of salvage and commercial exploitation in the sense that a common form of substandard archaeology is the undertaking of recovery or excavation studies which are eventually funded out of the resale of the artefacts and which merely use archaeology as a façade for discernible profit motives. The general threat of poor archaeology being carried out on UCH remains a threat, even within states who are members of the UNESCO Convention.[79]

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[75] Drye, W., 'Battle Begins Over World's Richest Shipwreck', *National Geographic News*, 18 December 2015, (at: http://news.nationalgeographic.com/2015/12/151218-san-jose-shipwreck-treasure-colombia-archaeology; accessed 1 May 2019)

[76] Phillips, C.R., (2007), *The Treasure of the San José: Death at Sea in the War of the Spanish Succession*, Johns Hopkins University Press (Baltimore), at pp. 165-171.

[77] Kraul, C., (2016), 'U.S., Colombian Treasure Dispute May Soon Play Out at Sea', *Los Angeles Times*, 10 January 2016, (at: http://www.latimes.com/world/mexico-americas/la-fg-colombia-treasure-20160110-story.html; accessed 1 May 2019); Watts, J. and Burgen, S., (2015), 'Holy Grail of Shipwrecks Caught in Three-Way Court Battle', *The Guardian*, 6 December 2015, (at: http://www.theguardian.com/world/2015/dec/06/holy-grail-of-shipwrecks-in-three-way-court-battle; accessed 1 May 2019).

[78] Ibid; Supra, n. 75.

[79] Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.

However, given that the very focus of the UNESCO Convention was on addressing such directly regulated activities, it is worth noting that it has been quite effective at addressing this threat. For example, as highlighted later, the 'Rules Concerning Activities Directed at the Underwater Cultural Heritage' in the Annex to the Convention (the 'Rules'), as well as the accompanying *Manual for Activities Directed at Underwater Cultural Heritage*, have driven forward a consistent and reasonably high set of standards for all archaeological interventions and management decisions.[80] Similarly, as is explored further in Chapter 2, the Convention has performed reasonably well at reducing the role of private commercial exploitation within archaeological projects directed at UCH and has set rules on when intervention should be justified, i.e., the point at which the in situ preservation of a site is no longer the best option for its protection.

ii. Indirectly regulated threats to underwater cultural heritage

- Looting

Perhaps the biggest threat to the UCH, outside of state-authorised salvage and archaeology, has been the covert and unreported looting and pilfering of artefacts, souvenirs or materials at UCH sites.[81] This is an indirectly regulated threat in the sense that regulation can only be enforced after-the-event, once the positive evidence of looting can be pieced together. It is therefore an unauthorised and unpredictable activity from a regulatory perspective. A particular difficulty is that most UCH sites are in highly exposed, vulnerable and under-policed locations. In many cases, objects may even be opportunistically lifted from sites whose location or existence has not even been yet discovered by others. For those sites which are known, even if they are officially designated as protected or if national regulation is in place to prosecute offenders for stealing from sites, it is incredibly difficult to detect breaches of the law or, in many cases, to compile sufficient evidence to carry forward a successful prosecution. This challenge is compounded even further in areas of the developing world where the incentive to profit from stealing is even higher and the resources to carry out effective criminal

[80] See infra Section 4(b).

[81] Gould, R.A., (2011), *Archaeology and the Social History of Ships*, 2nd Edn, Cambridge University Press (Oxford), at p. 368; Council of Europe Parliamentary Assembly, (1978), '*The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper)*', Doc. 4200-E, Council of Europe (Strasbourg), at p. 6; Supra n. 29, UNESCO, at para. 29; Clément, E. and Prott, L.V., (1996), 'UNESCO and the Protection of the Underwater Cultural Heritage', 48(4) *Museum International* 37-39, at p. 37; UNESCO, (2016), *The Impact of Treasure-Hunting on Submerged Archaeological Sites*, UNESCO (Paris), (at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/temp/uch-BrochurePillageADOPTED.pdf; accessed 1 May 2019).

investigations and prosecutions are lower. Yet, even in the states which are regarded as leading in the management of UCH, such as France and Italy, the use of technology and investment in offshore policing capacity has not yet been sufficient to completely deter looting.

In addition to the global attention-grabbing headlines, such as those relating to large-scale stripping of metals from famous World War I and II warships, it also needs to be recognised that looting and pilfering of UCH takes place every day through ostensibly innocent souvenir-taking by tourists and recreational divers.[82] With each individual pocketing the effect seems minimal, but when multiplied by the tens of thousands of divers around the world, it all adds up to a major global catastrophe.[83] While the vast majority of wreck divers have adopted the preservationist stance, the evidence of such widespread pilfering over the past decades has been clear and incontrovertible.[84] Indeed, cultural sites once rich with countless artefacts are, after periods of recreational activity, left barren with nothing more than a decaying hulk as proof of their existence.[85]

- Fishing

Being an indirectly regulated activity should not detract from the severity of fishing as a global threat to UCH. Some have even tried to argue it represents the greatest threat of all.[86] While the suggestion is quite wide-sweeping, it is not unfounded: especially if one considers that the most destructive method of fishing, bottom-trawling, is estimated to cover an area equivalent to 50% of the world's continental shelf every year.[87] Furthermore, this is happening in the areas where underwater heritage is found in the

[82] Luxford, D., (2006), 'Finders Keepers Losers Weepers – Myth or Reality? An Australian Perspective on Historic Shipwreck', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 300-307, Cambridge University Press (Cambridge), at p. 300; Scott-Ireton, D.A., (2008), 'Teaching 'Heritage Awareness' Rather than 'Skills' to Sports Diving Community', 3(2) *Journal of Maritime Archaeology* 119-120.

[83] Søreide, F., (2011), 'Maritime Archaeology and Industry', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 1010-1031, Oxford University Press (Oxford), at p. 1014; Abbass, D. K., (1999), 'A Marine Archaeologist Looks at Treasure Salvage', 30(2) *Journal of Maritime Law and Commerce* 261-268, at pp. 265-266.

[84] The Historic Shipwrecks Amnesty, arranged in Australia in 1993, resulted in an estimated 20,000 UCH objects being reported to officials from the wreck diving community (Rodrigues, J., (2009), 'Evidence in the Private Sphere: Assessing the Practicality of Amnesties to Record Lost Information', 5(1) *Archaeologies: Journal of the World Archaeological Congress* 92-109, at p. 100). Similarly, the UK's Receiver of Wreck promoted a similar amnesty in 2001, under which 30,000 previously unreported UCH objects were notified to them (supra n. 71, Dromgoole, at p. 320).

[85] Supra n. 70, Martin and Gane.

[86] Kingsley, S.A., (2015), *Fishing and Shipwreck Heritage: Marine Archaeology's Greatest Threat?*, Bloomsbury Academic (London).

[87] Rafferty, J.P., (2011), *Conservation and Ecology*, The Living Earth, Britannica Educational Publishing (New York), at p. 51.

highest concentration. Indeed, wrecks can often themselves become artificial reefs teeming with aquatic life, colourful biodiversity and marketable sources of seafood.[88] Such 'bulldozing' is happening indiscriminately and in locations where we simply do not know what historic heritage is there to be found. Kingsley highlights how historically significant sites such as the 8,000-year old Mesolithic site known as Doggerland, the wreck of the 73-gun Dutch warship *Eendracht* sunk in 1665 in the Battle of Lowestoft, and the unstudied humungous Mongol invasion fleet of Kublai Khan destroyed by a hurricane in 1281 on its way to Japan, are all sites threatened by fishing.[89]

Shellfish dredging, lobster potting and longline fishing are techniques that present a further risk to our heritage. Shipwrecks often show evidence of such damage by snagged hooks, pots, nets and lines eventually cut loose, sometimes after partially damaging or displacing the wreck first.[90] Also, from an ecological perspective, overfishing severely disrupts the fragile biological environment preserving our heritage. For example, the rapid acceleration in biological deterioration of *Titanic* and *Bismarck*, since their discovery in the 1980's, is widely put down to overfishing near the surface leading to nutrients falling around the ships, which then attracted a greater diversity of deep sea marine life, including higher concentrations of iron-consuming bacteria.[91] Even though cultural heritage protection appears lower down on the international agenda than marine environmental protection, it is worth noting that marine flora and fauna often have an opportunity of regeneration; however, once bulldozed or dragged away, historic heritage is obliterated forever.[92]

- Industry and Development

In addition to fishing and trawling, there are numerous other economic activities – such as building infrastructure, dredging, oil and gas extraction, building renewable energy farms, and cable and pipelaying – which pose an increasingly critical threat to UCH. In

[88] Krumholz, J.S. and Brennan, M.L., (2015), 'Fishing for Common Ground: Investigations of the Impact of Trawling on Ancient Shipwreck Sites Uncovers a Potential for Management Synergy', 61 *Marine Policy* 127-133.
[89] Supra n. 86, Kingsley, at pp. 66-67.
[90] Kingsley, S.A., (2010), 'Deep-Sea Fishing Impacts on the Shipwrecks of the English Channel & Western Approaches', in *Oceans Odyssey: Deep-Sea Shipwrecks in the English Channel, the Straits of Gibraltar and the Atlantic Ocean*, G. Stemm and S.A. Kingsley (Eds.), 191-234, Oxbow Books (Oxford).
[91] Pellegrino, C., (2012), *Farewell, Titanic: Her Final Legacy*, John Wiley & Sons (Hoboken), at pp. 53-54.
[92] HM Government, (2011), *UK Marine Policy Statement*, March 2011, HM Government Stationery Office (London), (at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf; accessed: 18 November 2018), at para. 2.6.6.2.

most national legal systems, such activities are increasingly subject to licensing based on prior environmental impact assessments being carried out, including a heritage impact assessment considering potentially affected UCH. The unpredictable quality and reliability of any such impact evaluation processes, as well as the resulting decision-making process related to proposed activities, is explored particularly in Chapter 4.

- Vandalism and Destruction

Vandalism can range from comparatively innocent prodding, pushing and touching, to more recognisably criminal activities such as interference, graffiti and arson.[93] Such destruction can also be accidental, such as when one of James Cameron's submersibles collided with the hull of the *Titanic* wreck causing significant damage,[94] or it can be more reckless, such as landing on or anchoring directly above wrecks when visiting.[95]

- Pollution

Sea pollution is a sadly familiar tragedy. From land run-offs of nitrogen-rich agricultural pesticides, to large-scale industrial disposal of toxic metals and compounds, to pipeline sewerage of harmful wastes, to floating islands of non-biodegradable and hazardous debris, to shipping pollution, to oil rig explosions leaving our blue ocean infused with 5 million barrels of poisonous and suffocating, thick, black oil.[96] It should be clear that pollution presents a direct and indirect threat to underwater heritage through alteration or deterioration of the marine environment. There is also a difficulty of pollution being left by tourists visiting dive sites. All such pollution can damage UCH sites by disturbing or confusing their archaeological context, or through heavy or harmful objects falling upon them, or by discarded dangerous objects, such as explosives, mines and radioactive substances, restricting access to them.[97]

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[93] McKinnon, J.F., (2015), 'Memorialization, Graffiti and Artifact Movement: A Case Study of Cultural Impacts on WWII Underwater Cultural Heritage in the Commonwealth of the Northern Mariana Islands', 10(1) *Journal of Maritime Archaeology* 11-2. On arson, see e.g. Davidson, B., (2003), 'West Pier Arson Probe', *The Argus*, 28 March 2003 (at: http://www.theargus.co.uk/news/5113744.West_Pier_arson_probe; accessed 1 May 2019).

[94] Eaton, J.P. and Haas, C.A., (1999), "*Titanic*"*: A Journey Through Time - An Illustrated Chronology of History's Most Famous Ship*, Patrick Stephens Ltd (Sparkford), at p. 205.

[95] Edney, J., (2006), 'Impacts of Recreational Scuba Diving on Shipwrecks in Australia and the Pacific: A Review', 5(1/2) *Micronesian Journal of the Humanities and Social Sciences* 201-233, at p. 214.

[96] Weis, J.S., (2015), *Marine Pollution: What Everyone Needs to Know*, Oxford University Press (Oxford); McNutt, M.K., Camilli, R., Crone, T.J., Guthrie, G.D., Hsieh, P.A., Ryerson, T.B., Savas, O. and Shaffer, F., (2012), 'Review of Flow Rate Estimates of the *Deepwater Horizon* Oil Spill', 109(50) *Proceedings of the National Academy of Sciences* 20260-20267.

[97] Bacchi, U., (2015), 'Sunken Fascist Ship that Became Mafia Underwater Explosives Trove Sealed by Italian Navy', *International Business Times*, 27 November 2015, (at: http://www.ibtimes.co.uk/sunken-fascist-ship-that-became-mafia-underwater-explosives-trove-sealed-by-italian-navy-1530854; accessed 1 May 2019); Excell, J., (2015), 'The Bombs That Lurk Off the UK Coast', *BBC Future*, 28 October 2015,

- Climate Change

A truly indirect harm to our international underwater heritage is that occurring from artificially accelerated alterations in the submarine environment. Both Dunkley and Perez-Alvaro recently analysed the ever-present global threat that climate change presents to our UCH, showing that increasing sea temperatures may result in greater numbers of invasive species.[98] For example, warming seas are likely to cause a greater proliferation and northward migration of blacktip shipworm *Lyrodus pedicellatus*, which is a great menace of historic wooden wrecks.[99] Rising sea levels will exponentially decrease the amount of time that archaeological divers will have to study wrecks and, more disquietingly, presents an alarming threat to submerged and partially submerged coastal and intertidal heritage sites. How the resulting increase of upper beach and terrestrial sediment in the marine environment might destabilise underwater archaeological sites is also hard to predict.[100]

It is well known that the ocean plays an essential regulator of global CO_2 levels by absorbing CO_2 and acting as a giant reservoir of carbon.[101] However, increases in anthropogenic CO_2 output since the Industrial Revolution has dramatically altered the levels of absorption, leading consequently to decreasing pH levels (acidification).[102] We do not know exactly what the potentially corrosive effects that increased ocean acidification will have on underwater structures and objects, but it is perhaps not difficult to guess. Changes to the aquatic environment, such as external weather patterns and increasing salinity differentials from increased rainfall and melting polar ice caps, might also have significant impacts on the force and unpredictability of underwater currents.[103] Climate change is truly an indirect harm and one needing to be addressed at the global level across every sector of society. Thus, the global imperative of achieving better ocean

(at: http://www.bbc.com/future/story/20151027-the-ticking-time-bomb-of-the-thames; accessed 1 May 2019).

[98] Dunkley, M., (2015), ''Climate is What We Expect, Weather is What We Get': Managing the Potential Effects of Oceanic Climate Change on Underwater Cultural Heritage', in *Water & Heritage: Material, Conceptual and Spiritual Connections*, W.J.H. Willems and H.P.J. van Schaik (Eds.), 217-230, Sidestone Press (Leiden); Perez-Alvaro, E., (2016), 'Climate Change and Underwater Cultural Heritage: Impacts and Challenges', 21 *Journal of Cultural Heritage* 842-828.

[99] Ibid, Dunkley, at p. 221; Ibid, Perez-Alvaro, at p. 843.

[100] Ibid, Dunkley, at p. 222.

[101] Handa, N. and Ohsumi, T. (Eds.), (1995), *Direct Ocean Disposal of Carbon Dioxide*, Terra Scientific Publishing Company (Tokyo).

[102] Raven, J., Caldeira, K., Elderfield, H., Hoegh-Guldberg, O., Liss, P., Riebesell, U., Shepherd, J., Turley, C. and Watson, A., (2005), *Ocean Acidification Due to Increasing Atmospheric Carbon Dioxide*, The Royal Society (London).

[103] Supra n. 98, Dunkley, 225-226.

governance in the regulation of fisheries, waste, energy and other marine economic activity all further supports us in the preservation of our marine historic heritage.

- Naturally Occurring Damage

As with all heritage environs – marine, subterranean, terrestrial and extraterrestrial – there is an element of naturally occurring degradation caused by non-anthropogenic environmental factors. In terms of UCH, such natural causes are often: the biological breakdown of materials, often through bacterial, fungal or faunal organisms;[104] the chemical breakdown of materials, such as through corrosion, rusting or concretion;[105] and the physical breakdown of materials, such as from underwater currents, storms, earthquakes and volcanoes.[106] In many cases, however, it is believed that underwater sites are capable of reaching a state of biological, chemical and physical equilibrium wherein their condition is relatively stable, especially for non-ferrous materials.[107] All such harms are worsened as a result of anthropogenic pressures, but have a baseline level that is ecologically inevitable and for which the effects can only be minimised by better preparation, monitoring and intervention.

4. The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage

(a) The Route to the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage

It is apparent that the protection of UCH was only a brief and last-minute consideration during the globally significant UNCLOS III negotiations, between 1973 and 1982, for a new law of the sea convention.[108] The laudable suggestion of utilising coastal state resources to protect UCH, often referred to as a 'Cultural Protection Zone', was

[104] Ward, I.A., Larcombe, P. and Veth, P, (1999), 'A New Process-Based Model for Wreck Site Formation', 26(5) *Journal of Archaeological Science* 561-570, at p. 563.
[105] Ibid.
[106] Booth gives the examples of the *Girona*, a Spanish Armada ship off Northern Ireland which is battered by storms each year, and of the Rabaul volcano in Papua New Guinea, which erupted and damaged popular dive sites in the vicinity (Booth, F., (2006), 'The Collision of Property Rights and Cultural Heritage; the 'Salvors and Insurers' Viewpoints', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 293-299, Cambridge University Press (Cambridge), at p. 293).
[107] Quinn, R., (2006), 'The Role of Scour in Shipwreck Site Formation Processes and the Preservation of Wreck-Associated Scour Signatures in the Sedimentary Record – Evidence from Seabed and Sub-Surface Data', 33(10) *Journal of Archaeological Science* 1419-1432; Gregory, D., (1995), 'Experiments into the Deterioration Characteristics of Materials on the Duart Point Wreck Site: An Interim Report', 24(1) *The International Journal of Nautical Archaeology* 61-66; Supra n. 57, Varmer, at pp. 280-281.
[108] Aznar, M.J.., (2003), 'Legal Status of Sunken Warships "Revisited"', 9(1) *Spanish Yearbook of International Law* 61-101, 85; Supra n. 20.

eventually raised by Greece and a supporting group of countries; yet came after negotiations on the continental shelf had already been completed.[109] Regardless, the whole concept faced considerable opposition from maritime states, particularly from the US, UK and Netherlands in the particular case.[110] Maritime states emphasised the significant concessions already offered to coastal states, such as the development of the exclusive economic zone (EEZ) and a regime for exploiting minerals and resources of the continental shelf.[111] As a result, the United States proposal of restricting the protection of UCH to a more vague and generalised duty on flag states won out.[112]

Article 303, being the central article on UCH protection under the widely ratified and influential LOSC, is therefore awkwardly bolted on to the back of the convention.[113] In some small effort to appease the numerous coastal states supporting greater substantive protections for cultural sites, a right of enforcement was unimaginatively annexed to unrelated enforcement powers in the contiguous zone.[114] 'The unfortunate result is that article 303 smacks of the worst aspects of a hastily agreed compromise', that is 'vague, ambiguous and ill-conceived.'[115]

Article 303 provides that:

> '1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33 [relating to the contiguous zone], presume that their removal from the seabed in the zone referred to in that article without its

[109] Informal proposal by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia, Informal Meeting, UN Doc. A/CONF.62/C.2/43 Rev. 3, 27 March 1980, United Nations (New York); Arend, A., (1982), 'Archaeological and Historical Objects: The International Legal Implications of UNCLOS III', 22(4) *Virgininia Journal of International Law* 777-804, at pp. 793-796.
[110] Supra n. 18, Caflisch, at p. 17.
[111] Dromgoole, S., (2013), 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001', 38 *Marine Policy* 116-123.
[112] Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590, at p. 566; Nordquist, (1985), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I, M.H. Nordquist, S. Rosenne and L.B. Sohn (Eds.), Martinus Nijhoff (Leiden), at p. 161. See Chapter 3.
[113] Supra n. 18.
[114] This clause 'is widely regarded as ineffective and insufficient for protection of the underwater cultural heritage' (O'Keefe, P.J. and Nafziger, J.A.R., (1994), 'The Draft Convention on the Protection of Underwater Cultural Heritage', 25(4) *Ocean Development and International Law* 391-418, at p. 409).
[115] Frost, R., (2004), 'Underwater Cultural Heritage Protection', 23 *Australian Yearbook of International Law* 25-50, at p. 30.

> approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
>
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.'[116]

There are many flaws with Article 303 which have drawn criticism. For example, in addition to awkwardly affixing UCH protection through unrelated enforcement rights in the contiguous zone under Article 303(2),[117] Article 303(3) was subsequently criticised for leaving the entire practice of salvage – the most prominent and direct legal threat to UCH – out of the Convention. Indeed, Scovazzi once famously referred to this as an 'invitation to looting'.[118] There are also uncertainties as to how Article 303(4) interacts with Article 311 on the creation of future agreements that are not in keeping with the jurisdictional balance of the LOSC.[119] In particular, Chapter 3 singles out concentrated criticism for Article 303(1) and for the normatively vague 'general duty' of cooperation sustained by powerful maritime states.[120] Overall, therefore, Article 303 is frequently regarded as having created a 'legal vacuum . . . that could easily lead to a first-come-first-served approach'.[121]

In addition to Article 303, there is also an unusual reference to UCH in the LOSC within the sui generis legal framework developed for the deep seabed (the 'Area') under Part XI.[122] Here, Article 149 States that:

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[116] Supra n. 3, LOSC, Art. 303.
[117] See Chapter 2.
[118] Scovazzi, T., (2002), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *The Protection of the Underwater Cultural Heritage: Legal Aspects*, G. Camarda and T. Scovazzi (Eds.), 113-134, Giuffrè Editore (Milan), at p. 125; Scovazzi, T., (2014), 'Underwater Cultural Heritage as an International Common Good', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 215-230, Hart (Oxford), at p. 222.
[119] Supra n. 111, Dromgoole, at p. 121.
[120] See Chapter 3.
[121] Supra n. 118, Scovazzi, 'UCH as a Common Good', at p. 221.
[122] This separate treatment of UCH is a result of the UNCLOS III negotiation being broken up into committees, with the First Committee looking separately at the regime for the peaceful uses of the deep seabed and the Second Committee more generally examining the law of the sea.

> 'All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.'[123]

Despite a nod of acknowledgement to the calls by several delegates for effective UCH protection in the Area, Article 149 is riddled with uncertainties and carries questionable enforceability as a legal norm.[124] What are objects of an 'archaeological or historical nature'? What does it mean by 'disposed of'?[125] How do we know what is 'for the benefit of mankind'? Why include both 'country' and 'state' of origin?[126] What are 'preferential rights' and how do we know if they have been regarded?[127] Who are states of 'cultural', 'archaeological' or 'historical origin', if not the state that owns the heritage?[128] In using the word 'or' does it mean 'as opposed to' or 'also including'?[129] Who is responsible for implementing and overseeing Article 149? Should it be International Seabed Authority (ISA) who have been specifically appointed to administer the Area?[130] For all of these

[123] Supra n. 3, LOSC, Art. 149.
[124] Scovazzi, T., (2006), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at pp. 286-287; Supra n. 49, Bautista, at p. 16; Oxman, B.H., (1988), 'Marine Archaeology and the International Law of the Sea', 12(3), *Columbia VLA Journal of Law and the Arts* 353-372, at p. 361; Supra n. 45, Dromgoole, at pp. 31-32; Strati, A., (1991), 'Deep Seabed Cultural Property and the Common Heritage of Mankind', 40(4) *International and Comparative Law Quarterly* 859-894, at pp. 871-892.
[125] 'The phrase 'shall be preserved or disposed of' writes an unfortunate conflict into the article-the question whether to preserve a shipwreck requiring the suspension of exploration or construction projects at enormous cost, or to "dispose of" it in some other way.' (Prott, L.V. and O'Keefe, P.J., (1984), *Law and the Cultural Heritage – Vol. 1: Discovery and Excavation*, Professional Books (Abingdon), at p. 98).
[126] Forrest, C., (2008), 'Historic Wreck Salvage: An International Perspective', 33(2) *Tulane Maritime Law Journal* 347-380, at p. 369.
[127] The meaning of 'preferential rights' remains incredibly vague in terms of UCH and is thus entirely ambiguous (Huang, J., (2013), 'Chasing Provenance: Legal Dilemmas for Protecting States with a Verifiable Link to Underwater Culture Heritage', 84 *Ocean and Coastal Management* 220-225, at p. 221; Supra n. 53, Dromgoole, at p. 60).
[128] E.g., Ibid, Huang, at pp. 220-221; Supra n. 124, Strati, at p. 886; Watters, D.R., (1983), 'The Law of the Sea Treaty and Underwater Cultural Resources', 48(4) *American Antiquity* 808-816, at p. 811.
[129] 'Article 149 recognises three different categories of States as claimants to these rights without defining the employed terms and without establishing priorities. Inevitably, conflicts will arise as to which State has priority over the discovered items. With shipwrecks, the additional problem may arise as to whether the right of the State of origin of the ship prevails over the right of the State of origin of individual artefacts from its cargo.' (Supra n. 124, Strati, at pp. 879-880).
[130] The mandate of the ISA is to oversee 'activities in the Area' which are restrictively defined under Article 1(2) as mineral exploration and exploitation (supra n. 3, LOSC, Art. 157(3); Strati, A., (1995), *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, Springer (New York), at pp. 300-306; Caflisch has said of this weakness that it deprives Article 149 of 'all real significance' (supra n. 18, Caflisch, at p. 29); 'Article 149 is limited to a considerable extent by the failure to establish an international agency' (supra n. 124, Strati, at p. 877).

reasons, it was widely accepted that the LOSC had completely failed to protect UCH.[131] As Aznar recently said, Article 149 'contains so many caveats . . . that the legal regime it creates fails to provide clear answers on how to protect the UCH',[132] such that Dromgoole once referred to it as an 'empty shell'.[133] As a result, as Strati once put it, the LOSC 'scheme is, no doubt, incoherent and incomplete. Archaeological and historical objects found on the continental shelf, beyond the 24-mile limit, are "free for all", while those found on the deep seabed are to be preserved for the benefit of mankind as a whole.'[134]

While UNCLOS III was under way, efforts were undertaken at the Council of Europe to draft a convention for the protection of UCH across neighbouring states (hereafter the '1985 Draft European Convention').[135] The exercise proved successful in demonstrating that middle ground can be found on many points of contention on UCH protection, such as rules on salvage and the proper archaeological treatment of sites.[136] In many ways, however, given that its negotiation took place immediately after UNCLOS, negotiations over the 1985 Draft European Convention struggled to go beyond the strict jurisdictional limits which were set in the detailed UNCLOS negotiations.[137] Furthermore, the resulting draft Convention failed when submitted to the Council of Ministers for approval, where once more it was the question of jurisdiction beyond territorial waters, and the Greek proposal of a cultural protection zone, which caused particular consternation among maritime nations.[138] Later, another European Convention, this time a broad 1992 European Convention relating to the protection of archaeological sites ('Valletta Convention'),[139] specifically made reference to preservation of UCH with the intention

[131] One noted Law of the Sea commentary has said that the LOSC's treatment of UCH was 'complicated and not complete' (Nandan, S.N., (2002), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI, M.H. Nordquist, S.N. Nandan, M.W. Lodge and S. Rosenne (Eds.), Martinus Nijohoff (Leiden), at p. 230.
[132] Aznar, M.J., (2017), 'Exporting Environmental Standards to Protect Underwater Cultural Heritage in the Area', in *The International Legal Order: Current Needs and Possible Responses*, J. Crawford, A. Koroma, S. Mahmoudi and A. Pellet (Eds.), 253-273, Brill Nijhoff (Leiden), at p. 256; 'Article 149 is vague enough to allow more than one interpretation.' (Supra n. 124, Strati, at p. 878).
[133] Supra n. 45, Dromgoole at p. 261.
[134] Supra n. 124, Strati, at p. 890.
[135] Supra n. 36, Council of Europe, para. 1(a); Council of Europe Committee of Ministers, (1985), 'Ad Hoc Committee of Experts on the Underwater Cultural Heritage (CAHAQ), Final Activity Report', in *Conclusions of the 387th Meeting of the Ministers' Deputies*, Doc. CM/Del/Concl (85) 387, 115-120, Council of Europe (Strasbourg).
[136] Supra n. 45, Dromgoole, at p. 44.
[137] 'The influence of UNCLOS III is hardly surprising given that the final versions of Articles 149 and 303 had been more or less settled by the time [the committee] started its work' (supra n. 45, Dromgoole, at pp. 42-43).
[138] Supra n. 135, CAHAQ Final Activity Report. Turkey provided the main opposition to the draft given particular disagreements with Greece over the impact of a cultural protection zone on the Aegean Sea (Supra n. 45, Dromgoole, at pp. 42-43; Supra n. 130, Strati, at p. 87).
[139] Supra n. 31, Valletta Conventtion.

of increasing protection in this field.[140] However, while highly successful and widely adopted as an archaeological site management treaty, it did not address the conflicting national perspectives toward UCH protection beyond the territorial sea.[141] Furthermore, the treaty was developed from a land planning perspective, with a more general objective of harmonising archaeological standards, so did not effectively translate into the marine environment or address the specific threats to UCH.[142]

In 1989, the International Law Association's newly created Cultural Heritage Committee began work on a convention for the protection of UCH,[143] drawing up a first Draft Convention in 1990[144] and a second Draft in 1992.[145] However, it was the third Draft, published in 1994 at the ILA's 66th Conference in Buenos Aires (Buenos Aires Draft)[146] which was ultimately forwarded on to UNESCO for consideration as an international instrument.[147] Meanwhile, the International Committee on the Underwater Cultural Heritage (ICUCH) was established in 1991 as a special sub-committee of ICOMOS, tasked with developing a set of archaeological principles to be included within the draft convention.[148] After developing two draft agreements, one in London in 1994, then in Paris in 1995, the ICUCH developed its *International Charter on the Protection and Management of the Underwater Cultural Heritage*, which was presented and adopted at the 11th ICOMOS General Assembly in Sofia in October 1996 (ICOMOS Charter).[149]

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[140] 'The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.' (Supra n. 3, LOSC, Art. 1(3).

[141] Supra n. 18, O'Keefe, at p. 11; For example, the Explanatory Memorandum of the Valletta Convention (supra n. 31) equivocally declares that state jurisdiction over UCH 'can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone'.

[142] Supra n. 45, Dromgoole, at p. 47.

[143] Supra n. 114, O'Keefe and Nafziger, at p. 391.

[144] International Committee on Cultural Heritage Law, (1990), 'Committee on Cultural Heritage Law – First Report', in *Report of the Sixty-Fourth Conference, Held at Broadbeach, Queensland Australia, 20-25 August 1990*, J. Crawford, D.H.N. Johnson and I. Brownlie (Eds.), 208-228, International Law Association (London), Appendix I.

[145] International Committee on Cultural Heritage Law, (1992), 'Report and Draft Convention for Consideration at the 1992 Conference', in *Report of the Sixty-Fifth Conference, Held at Cairo, Egypt, 21-26 1992*, A. Boyle, A.H.A. Soons, E. Gaillard and Y. Iwasawa (Eds.), 338-365, International Law Association (London).

[146] International Committee on Cultural Heritage Law, (1994), 'Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage – Final Report', in *Report of the Sixty-Sixth Conference, Held at Buenos Aires, Argentina, 14-20 August 1994*, J. Crawford and M. Williams (Eds.), 432-451, International Law Association (London).

[147] Supra n. 18, O'Keefe, at p. 23.

[148] See generally, ICOMOS, (2014), *Statute of the ICOMOS International Committee on the Underwater Cultural Heritage*, 17 September 2014, ICOMOS (Paris), (at: http://www.icuch.icomos.org/icuch-statutes; accessed 1 May 2019)

[149] ICOMOS, (1996), *Charter on the Protection and Management of Underwater Cultural Heritage*, Ratified at 11th General Assembly, Held at Sofia, October 1996 (see ICOMOS, (1997), *News*, Vol. 7(1), January 1997, ICOMOS (Paris), (at: https://www.icomos.org/newsicomos/news1991/1997-7-1.pdf; accessed 1 May 2019).

In 1993, UNESCO began investigating the feasibility of an international instrument along the lines of the Buenos Aires Draft,[150] with the results being presented to the Executive Board at its 146th Session in 1995.[151] It found that the LOSC's treatment of UCH was 'not adequate' and that a sui generis international instrument was needed, as opposed to a mere extension of the LOSC through an implementation agreement.[152] It further concluded that the Buenos Aires Draft would form a good starting point and that UNESCO would be the most suited international organisation to oversee its development and implementation.[153] From here the UNESCO Convention was drafted via yearly intergovernmental meetings of expert representatives from UNESCO Member States, along with interested states, organisations and experts, which were held in Paris from 1998 to 2001, with the final adoption of the UNESCO Convention taking place at a plenary session, in November 2001, following UNESCO's 31st General Conference in October.[154] The final treaty was adopted with 87 states in favour, 4 states against,[155] and 15 states abstaining.[156] It contains 35 Articles, with an accompanying Annex codifying a further 36 Rules detailing underwater archaeological principles of good practice and providing practical guidance on ensuring UCH preservation (the 'Rules'). The Rules were negotiated separately by a team of marine archaeology experts, but with a close reliance on the ICOMOS Charter and Valletta Convention.[157]

The Convention does not create a permanent body to oversee its implementation, but instead instituted a regular Meeting of the Parties (MOP), where the parties will themselves negotiate the MOP's ongoing functions and responsibilities,[158] supported by a permanent UNESCO Secretariat in Paris.[159] The Convention also encouraged the MOP

[150] Supra n. 18, O'Keefe, 23; UNESCO Executive Board, (1993), *Decisions Adopted by the Executive Board at its Hundred and Forty-First Session, Paris, 10-28 May 1993*, UN Doc. 141/EX Decisions, UNESCO (Paris), Section 5.5.1, para. 15.
[151] UNESCO Executive Board, (1995), *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, UN Doc. 146 EX/27, UNESCO (Paris).
[152] Ibid, Para. 42.
[153] Ibid, Paras. 18-20.
[154] UNESCO, (2003), *Records of the General Conference, 31st Session, Paris 2001, Volume 2: Proceedings*, UN. Doc 31/C Proceedings, UNESCO (Paris), at pp. 561-571.
[155] Russian Federation, Norway, Turkey and Venezuela.
[156] Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland, Uruguay and United Kingdom. See statements made by many of these states regarding their vote in: Garabello R. and Scovazzi, T. (Eds.), (2003), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Martinus Nijhoff (Leiden), at pp. 239-253.
[157] Supra n. 54, UK UNESCO Convention Review Group, at p. 18.
[158] Supra n. 1, UNESCO Convention, Art. 23, paras. 1-3.
[159] Supra n. 1, UNESCO Convention, Art. 24.

to establish a supporting Scientific and Technical Advisory Body (STAB), to provide expert support to the MOP 'in questions of a scientific or technical nature.'[160] Such STABs are an increasingly common feature in environmental treaties, being particularly effective at ensuring all decisions are guided from a scientific and non-political perspective.[161] Notably, however, unlike most modern environmental treaties, the Convention provides no clear mechanism for reviewing the implementation of the treaty in states' internal legislation, instead relying on the states to monitor their implementation of its rules themselves.[162]

Despite a relatively languid start, the Convention has recently begun to gain global traction and, at the time of writing, has 61 states parties.[163] Although the text initially only seemed palatable to less-developed coastal and landlocked states,[164] recent indications are that increasingly powerful maritime states – the original detractors of the Convention – are beginning to recognise its necessary import, with states such as Spain, Portugal, France, Italy, Argentina, Algeria, South Africa, Egypt, Belgium and Morocco all having joined. Interestingly, the Netherlands, Germany and Ireland, each once critical of the Convention, are also soon to be added to the growing list of maritime states.[165] Even one of the Convention's most prominent detractors and one whose national laws conflict quite considerably, the United Kingdom, even declared in a government White Paper in 2016 that it will reconsider its position and may soon ratify.[166] However, from what can only be perceived as political distraction from the vote to leave in the EU Referendum in June 2016 (known as 'Brexit'), the UK later repealed this promising statement of intent in September 2017.[167]

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[160] Supra n. 1, UNESCO Convention, Art. 23, paras. 4 and 5.
[161] For example, the United Nations 1992 Convention on Biological Diversity has been particularly effective by incorporating a *Subsidiary Body on Scientific, Technical and Technological Advice* (SBSTTA). See generally, van der Hove, S., (2007), 'A Rationale for Science–Policy Interfaces', 39(7) *Futures* 807-826; c.f. Khakzad, S., (2014), 'Underwater Cultural Heritage Sites on the Way to World Heritage: To Ratify the 2001 Convention or Not to Ratify?', 2(1) *Journal of Anthropology and Archaeology* 1-16, at p. 13.
[162] Supra n. 1, UNESCO Convention, Art. 22.
[163] See UNESCO, 'Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001 – States Parties', (at: http://www.unesco.org/eri/la/convention.asp?KO=13520; accessed 1 May 2019).
[164] Although it is noteworthy that Spain and Portugal, both relatively powerful maritime States with a strong historic interest in UCH, were early adopters, as was Mexico, another State with a powerful naval presence.
[165] Supra n. 54, UK UNESCO Convention Review Group, 23
[166] Department for Culture, Media & Sport, (2016), *The Culture White Paper*, Presented to Parliament by the Secretary of State for Culture, Media & Sport, March 2016, Cm 9218, DCMS (London), at p. 46.
[167] Department for Culture, Media & Sport (2017), 'Underwater Cultural Heritage', Written Statement from the Parliamentary Under-Secretary of State for Digital, Culture, Media and Sport (John Glen), 31 October 2017, *Hansard*, HCWS208, (at: http://hansard.parliament.uk/commons/2017-10-31/debates/1710312800 0011/UnderwaterCulturalHeritage; accessed 1 May 2019).

(b) Positive Achievements of the Convention

While this research aims to draw out of weaknesses of the UNESCO Convention, in order to make proposals intended to improve its implementation, it is also important to take a moment to list many of its exemplary achievements. Just on the basis of the following, the Convention should be universally ratified.

- A key objective of the Convention was to create a global shift in attitude towards recognising the importance and public value of UCH. Prior to the Convention, far too much legitimacy was given to those who view UCH as either sites of treasure, open to exploitation, or discarded scrap, open to demolition or plunder. It is observable that over the past two decades there has been evidence of a wide-scale culture shift, as well as a discernible quietness among the once-vocal community advocating treasure hunting legitimacy. The disastrous outcome for OME in the *Mercedes* case in 2012,[168] and the UK government backing away from its 2008 agreement with the same to share in the spoils of the HMS *Victory* (1744),[169] are examples of this.[170] In order to bring about this transformation in global attitudes towards UCH, the Convention utilises a combination of capacity building, skills and education programmes, university and academic networking, promotion of proper conservation and underwater archaeological practice, investment in poorer regions, and improved lines of communication between all stakeholders with an interest or stake in UCH protection.[171] The Convention should be especially praised for its achievements in this regard, as well as for the zeal demonstrated by the MOP, STAB and UNESCO in taking to the task.[172]

- The most aspirational feature of the Convention is perhaps Article 2, which assumes an essential anchoring role. This Article calls upon states to 'cooperate'[173] and to take 'all appropriate measures . . . using for this purpose the best practical means at their

[168] See Chapter 2.
[169] MOD News Team, 'Blog: Defence in the Media', 6 March 2015, UK Ministry of Defence (London), (at: http://modmedia.blog.gov.uk/2015/03/06/defence-in-the-media-6-march-2015; accessed 1 May 2019). See also Reynolds, R., (2019), 'Judicial Review Undertaken for HMS Victory Salvage', *Institute of Art & Law*, 10 April 2019, (at: https://ial.uk.com/judicial-review-undertaken-for-hms-victory-salvage/; accessed 1 May 2019).
[170] Supra n. 71, Dromgoole, at p. 371; Supra n. 49, Bautista, at p. 28.
[171] Supra n. 1, UNESCO Convention, Preamble and Arts. 19-22. See also the UNESCO website on UCH which provides an excellent hub for information, cooperation and resources (at: http://www.unesco.org/new/en/culture/themes/ underwater-cultural-heritage/2001-convention; accessed 1 May 2019).
[172] Supra n. 49, Bautista, at p. 23.
[173] Supra n. 1, UNESCO Convention, Art. 2(2).

disposal'[174] to 'preserve [UCH] for the benefit of humanity'[175] with 'preservation in situ [being] considered as the first option'[176] where, at all times, UCH 'shall not be commercially exploited.'[177] Taken together this article is effective at inspiring a more preservationist approach ab initio. In particular, by calling for 'all appropriate measures' it implicates changes to domestic legislation in their treatment of UCH. For example, by states trying to ensure law is in place to evaluate ex ante UCH's preserved status before engaging in both direct and indirectly harmful activities.[178]

- The prohibition on commercial exploitation under Article 2(7) is critical. As discussed in Chapter 2, the Convention makes a commendable effort to take UCH out of the domain of property which is subject to private short-term profiteering and, instead, turning it into global common property for the benefit of humanity.[179] Article 4 supports this further by removing salvage while ensuring that some sensible leeway is left for moderate non-exploitative commercial activities.[180]

- The annexed Rules are a resounding success. By incorporating and updating the ICOMOS Charter, with expert involvement from archaeologists, the Convention has secured widespread adherence to underwater archaeological good practice in the Rules and supporting guidance. Even states who were outwardly opposed to the Convention's final draft, such as the US, UK and Norway, have made clear that they will apply the Rules in all activities directed at UCH.[181] This all integrates well with the Convention's development of a global UCH management framework built around cooperation, capacity building, training and education. As Dromgoole said, it is 'difficult to overstate' the significance of the Rules, which 'are not simply an integral part of the Convention in a technical sense; they are integral to its entire spirit and

[174] Supra n. 1, UNESCO Convention, Art. 2(4).
[175] Supra n. 1, UNESCO Convention, Art. 2(3).
[176] Supra n. 1, UNESCO Convention, Art. 2(5).
[177] Supra n. 1, UNESCO Convention, Art. 2(7).
[178] Maarleveld, T.J., Guérin, U. and Egger, B. (Eds.), (2013), *Manual for Activities directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO (Paris), at pp. 61-78.
[179] See Chapter 2.
[180] For example, Carducci has referred to Article 4 as a 'major achievement' of the Convention (supra n. 51, Carducci, at p. 425).
[181] UNESCO, (2009), *Meeting of States Parties to the Convention on the Protection of Underwater Cultural Heritage: Second Session, Paris, 15 September 2009*, UN Doc. UCH/09/2.MSP/220/4 REV, UNESCO (Paris), Annex I, paras. 12-13; Department of Culture, Media and Sport, (2005), House of Commons Debate, 24 January 2005, *Hansard*, Vol. 430, Col. 46W; Statements on Vote by Norway, (2002), (from: supra n. 118, Camarda and Scovazzi, at p. 430); Varmer, O., Gray, J. and Alberg, D., (2010), 'United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 129-141, at pp. 130-131; Supra n. 18, O'Keefe, at p. 119.

ethos.'[182] Similarly, in interview, Williams expressed his indifference to state ratification of the whole Convention, given that agreements by most states to adopt the Rules as best practice, means that they have effectively signed up to '98 to 99% of the Convention'.[183]

- The UNESCO Convention neatly integrates into the international legal framework protecting cultural heritage, such as the UNESCO 1970 Convention on Cultural Property, the UNIDROIT 1995 Convention and the ICOM Museum Code of Ethics.[184] This same "latching on" can be witnessed for intangible cultural heritage under the UNESCO 2003 Convention on the Protection of Intangible Cultural Heritage.

- Recognising the importance of regional agreements and supranational organisations in marine environmental protection, as well the role of bilateral agreements in matters of UCH protection, the Convention smartly promotes the use of further such treaties.[185] The Convention thus acts almost as a 'Framework Convention', from which future state negotiation, practice and improvement can emerge.[186] Nevertheless, it is obvious to many that despite some ad hoc bilateral agreements or broad region-wide accords,[187] states remain slow to conclude any powerful agreements in this regard.[188] The need to finally expand subsequent regimes and further multi-level governance approaches, both within and without the UNESCO Convention, is therefore the focus of this study.

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[182] Supra n. 45, Dromgoole, at p. 58.
[183] Supra n. 49, Williams.
[184] 'Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the [1970 UNESCO Convention on Cultural Property and the World Heritage Convention]' (Supra n. 1, UNESCO Convention Preamble).
[185] Supra n. 1, UNESCO Convention, Art. 6; Supra n. 124, Scovazzi, at p. 291.
[186] Supra n. 51, Carducci, at p. 427. See Chapter 10.
[187] See Chapter 4. Two well-known examples of broad multilateral agreements include the *Titanic Agreement* and the *MS Estonia Agreement* which, in the case of the former only has two states, and with the latter provides little beyond very general duties of responsibility (Bureau of Oceans and International Environmental and Scientific Affairs, (2004), *Agreement Concerning the Shipwrecked Vessel RMS Titanic*, Washington DC, 18 June 2004; Swedish Ministry for Foreign Affairs, *Överenskommelse med Estland och Finland om m/s Estonia*, 1995: SÖ: 36 (adopted in Tallinn, 23 February 1995) [Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia]).
[188] Dromgoole, S., (2006), 'Editor's Introduction', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), xxvii-xxxviii, Martinus Nijhoff (Leiden), at p. xxxvi; '[T]he number of UCH treaties is still small, compared with bilateral treaties concerning prohibiting and preventing illicit import, export and transfer of ownership of cultural properties' (supra n. 127, Huang, at pp. 224-225); Supra n. 112, Risvas, at p. 586. See Chapter 4.

- As has similarly proven effective with environmental protection treaties, the Convention is especially far-sighted for formalising the role of scientific and technical experts under the appointed STAB.[189] Being a public-private hybrid encourages ongoing work which is predominantly scientific, public and evidence-based, rather than private or political.[190] This academic supervision, furthermore, plays a positive role in attracting engagement with the Convention and incentivising states to become actively involved.[191] In this same way, UNESCO has learned from earlier lessons in environmental protection by improving integration of civil society into the workings of UNESCO and by permitting registered NGOs continued access and involvement within the MOP.[192]

- In comparison with Article 16 of the Buenos Aires Draft – with a single clause providing for arbitration or, if this fails, adjudication in the ICJ – the UNESCO Convention's Article 25 on dispute settlement is certainly an improvement. In particular, Article 25(2) invites states parties who have failed to resolve any dispute by first negotiating, to explore mediation through UNESCO. However, in terms of appointing a final adjudicator should disputes ever escalate through all the stages, Article 25(3) simply adopts Part XV of the LOSC. There are some issues with this, which are beyond the focus of this study, although Part XV does at least provide a fair variety of final adjudicators from which to choose, including the more flexible institution of arbitration.[193]

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[189] Supra n. 1, UNESCO Convention, Art. 23(4) and (5). There are numerous examples of this working in other treaties, e.g. the Subsidiary Body on Scientific, Technical and Technological Advice of the Convention on Biological Diversity (1992), Subsidiary Body for Scientific and Technological Advice of the UN Framework Convention on Climate Change (1992), Committee on Science and Technology of the UN Convention to Combat Desertification (1994), and the Advisory Committees of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).

[190] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File; Alvarez, J.E., (2005), *International Organizations as Law-Makers*, Oxford University Press (Oxford), at pp. 338-400; Haas, P.M., (1992), 'Introduction: Epistemic Communities and International Policy Coordination', 46(1) *International Organization* 1-35.

[191] Supra n. 18, O'Keefe, at pp. 158-159.

[192] This development in fact was made by the MOP themselves, working in cooperation with the newly appointed STAB, in the first few meetings of the States Parties (UNESCO, (2009), *Resolutions of the First Session of the Meetings of States Parties*, 26-27 March 2009, UN Doc. CLT/CIH/MCO/2009/ME/98, Annex to Resolutions 5/MSP 1, UNESCO (Paris); UNESCO, (2009), *Meeting of States Parties to the Convention on the Protection of Underwater Cultural Heritage, Item 6 on the Provisional Agenda: Accreditation of Non-Governmental Organizations for cooperation with the Scientific and Technical Advisory Body*, 15 September 2009, UN Doc. UCH/09/2.MSP/220/6 REV. 2, UNESCO (Paris), at para. 1).

[193] Daly, B.W., (2006), 'Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 465-474, Cambridge University Press (Cambridge), at p. 469; Supra n. 44, UNESCO, at Annex I, para. 38; Oxman, B.H., (2015), 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', in *The Oxford Handbook on the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 394-415, Oxford University Press (Oxford), at p. 415.

- ❖ As intended and as examined more closely in Chapter 2, the Convention has in the main succeeded in improving global protection for UCH given the particular lack of protection under the LOSC. As discussed, Articles 149 and 303 of the LOSC had various faults, such as in the case of the former, suffering from inescapable vagueness[194] and only treating UCH in the Area as global common heritage, and with the latter, lacking legal normativity and completely failing to remove the application of salvage law to UCH.[195]

5. Conclusion: Critically Examining the Implementation of the UNESCO Convention

This chapter has introduced the framework and methodology which is to be adopted for this thesis. The principal questions of the study, as highlighted, require an appraisal of the legal system in which the UNESCO Convention is instituted and a search for evidence to suggest that a more vertical and multiple-level governance approach – bringing in non-state and hybrid actors across the global, regional and local community scales – would provide better or additional protection for UCH. As has been explained, the study will rely on both secondary sources of material across an array of social sciences research fields, as well as both archaeology and law research resources, in addition to stakeholder interviews with 11 experts in UCH protection policy or marine governance. The thesis will also take a particular interest in Northern European seas throughout the analysis, as a useful case study in which to situate the analysis, with particular regard being paid to states and systems operating in the North-East Atlantic.

The chapter has also set the scene by introducing the plight of UCH sites and objects around the world, explaining the manifold direct and indirect activities which threaten their survival and preservation. Having highlighted the weaknesses with the substantive international legal framework protecting UCH in the past half-century, the chapter introduced the UNESCO 2001 Convention and explored its various strengths as a globally-oriented multilateral treaty in the protection of UCH. As the chapters that follow will argue, there are numerous strengths of the UNESCO Convention which should support its widespread ratification, promotion and committed implementation.

[194] Supra nn. 122-134.
[195] Supra nn. 114-121; Supra n. 3, LOSC, Art. 303(3); Supra n. 124, Scovazzi, at pp. 287-288.

Nevertheless, the argument of the thesis is that the UNESCO Convention alone will not be as effective or efficient at protecting UCH. Instead, parallel efforts must now be taken at the global, regional and local community scales, utilising public and private sources of regulation, and operating in productive synergy with horizontal state bargaining at the national scale, in order to expand the quality, effectiveness and implementation of such regulation across all contexts. Chapter 2, which follows, will explore the UNESCO Convention in further detail, demonstrating how it is unfortunately limited to addressing threats from direct activities, such as salvage or substandard archaeology, rather than addressing the ever-increasing and increasingly more critical threat to UCH from indirect, incidental or illegal activity.

Chapter 2

Direct and Indirect Threats to Underwater Cultural Heritage and the UNESCO Convention

Chapter Abstract:

This chapter provides an introduction to the international legal rules protecting underwater cultural heritage (UCH). It highlights how early literature on the subject and much of the UNESCO Convention negotiations were focused on two competing approaches to UCH management; one viewing UCH opportunistically, as an object of salvage or the law of finds; the other, utilising a more preservationist stance, where it is protected and enjoyed within the public sphere. The chapter then introduces a new 'multiple-value' model for appraising UCH and its numerous abstract values, serving to both resolve the 'preservationism v. opportunism debate' in favour of prioritising the archaeological arguments for better preservation, as well as setting up further analyses in later chapters. Overall, the chapter demonstrates that while the UNESCO Convention was successful at addressing the main concern at that time, i.e., treasure hunters and state-sanctioned salvage, it failed to properly address the growing list of increasingly critical threats to UCH beyond treasure hunting, such as looting and incidental damage from indirect economic activities.

1. Introduction: The International Law Protecting Underwater Cultural Heritage

The following chapter provides an introduction to the law protecting underwater cultural heritage (UCH). It demonstrates that a large part of the academic discourse on UCH protection law has been dominated, for a number of decades, by a binary debate between the opposite approaches of preservationism and opportunism. As demonstrated, 'preservationists' predominantly refers to the archaeological and conservation community, who have propounded academic arguments in favour of protecting UCH in situ to the fullest extent; with 'opportunists' encapsulating treasure hunters and supporting scholars who allege that ancient admiralty laws support their right to collect generous salvage rewards for extracting and returning valuable submerged materials to the market. This vivid debate is therefore used within Section 2 as a backdrop to the exploration of some of the public and private laws, both domestic and international, which are widely adopted in the protection of UCH.

The chapter then provides a detailed introduction to a multiple-value approach which can be adopted in the future management of UCH. It argues that such an approach provides a suitable mechanism for firmly resolving the preservationism v. opportunism debate and also provides a useful tool in future decision-making over the preservation of UCH. It also finds that, in many senses, such a multiple-value approach has been, consciously or unconsciously, instituted into several terms of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (the "UNESCO Convention").[1] In other words, the UNESCO Convention has done an adept job of addressing the age-old concern among UCH conservationists of legalised treasure salvage. However, unfortunately, as has become increasingly accepted knowledge, the chapter then demonstrates how the UNESCO Convention's devoted focus on the threat of salvage and substandard marine archaeology, has meant that all the other hugely important and growing threats to UCH – such as looting, trawling, dredging, shipping, and offshore development – have yet to be satisfactorily addressed by regulation.[2] As Dromgoole once rightly predicted, 'the biggest challenge for the future is likely to be dealing with inadvertent damage or destruction to the UCH from human activities.'[3]

2. The Preservationism v. Opportunism Debate and Underwater Cultural Heritage

(a) Preservationism v. Opportunism in the Management of Underwater Cultural Heritage

i. The preservationists

For archaeologists, UCH is a repository of historical information and data.[4] Their core objective is to preserve such cultural sites and in the best possible condition for future

[1] UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.

[2] Aznar, M.J., (2017), 'Protecting Underwater Cultural Heritage in EU Waters, A Legal Approach (2016-2017)', Honor Frost Foundation, (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2017/02/Mariano-Aznar-Protecting-underwater-cultural-heritage-in-EU-waters-a-legal-approach-2016-2017.pdf; accessed 8 November 2018).

[3] Dromgoole, S., (2006), 'United Kingdom', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 314. Similarly, Kvalø and Marstrander have said that the 'main threats to sites outside territorial waters of Norway are today considered to be industrial activities – fisheries, especially trawling, dredging and the exploitation of oil and gas. […] Inside territorial waters the main threat comes from development activities, which generally take place closer to the shore. […] There is no clear evidence that commercial exploitation of UCH . . . is a significant problem or is increasing.' (Kvalø, F. and Marstrander, L., (2006), 'Norway', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 217-228, Martinus Nijhoff (Leiden), at p. 218).

[4] Prott, L.V., (1997), 'Safeguarding the Underwater Cultural Heritage: UNESCO Moves Ahead', 49(1) *Museum International* 39.

study and analysis.[5] This includes consideration of the future archaeology and deep sea diving technology providing more productive and less destructive archaeological research for future generations.[6] Contrary to common belief, modern-day archaeology is not about the ruthless exhumation of artefacts,[7] but about ongoing non-destructive analyses such as site surveying, digital reconstructions, mapping of landscapes and object assemblage, desktop research, photographs and films, analysis of organic and inorganic matter, conducting sonar and magnetometer surveys, interpreting data, or even experimental archaeology.[8] For these same reasons, archaeologists resent the notion of widely dispersing archaeological collections as individual artefacts around the world's museums and prefer that objects are kept within their original context and layout for future contextual analysis or kept together as a complete collection with all of this data included.[9] The overall aim for all archaeologists is therefore the pursuit of further knowledge with the objective being, in all archaeological projects, the discovery and dissemination of new data and a detailed academic paper.[10]

While excavation or recovery of underwater archaeological sites may appear attractive initially, for example because of the intimate detail in which raised objects can be studied and the commercial value of artefacts collected, there are a number of reasons why this is seen as a last resort in the field.[11] First, as above, once a site is raised and de-contextualised, it is no longer a source of information. What is more, future findings from desktop research, studies conducted on related sites, or the development of new technologies, should normally stimulate archaeologists into returning to a preserved site

[5] See Chapter 1, Section 2.
[6] Hall, J.L., (2011), 'Things, Inc.: A Case for *In Situ* Application', in *Maritime Law: Issues, Challenges & Implications (Laws and Legislation)*, J.W. Harris (Ed.), 27-52, Nova Science Publishers (New York), at pp. 32-33; Council of Europe Parliamentary Assembly, (1978), '*The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper)*', Doc. 4200-E, Council of Europe (Strasbourg), at p. 6.
[7] Ibid.; Abbass, D. K., (1999), 'A Marine Archaeologist Looks at Treasure Salvage', 30(2) *Journal of Maritime Law and Commerce* 261-268, at p. 262.
[8] See generally, Nautical Archaeological Society, (2008), *Underwater Archaeology: The NAS Guide to Principles and Practice*, 2nd Edn, A. Bowens (Ed.), Wiley-Blackwell (New York).
[9] Fletcher-Tomenius, P. and Forrest, C., (2000), 'Historic Wreck in International Waters: Conflict or Consensus?', 24(1) *Marine Policy* 1-10, at p. 3.
[10] Bass, G.F., (2011), 'The Development of Maritime Archaeology', in *The Oxford Handbook of Maritime Archaeology*, B. Ford, D.L. Hamilton and A. Catsambis (Eds.), 3-24, Oxford University Press (Oxford), at pp. 10-11; Hutchinson G., (1996), 'Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historical Sites and Objects Found at Sea', 20(4) *Marine Policy* 287-290, at p. 289.
[11] Throckmorton, P., (1990), 'The World's Worst Investment: The Economics of Treasure Hunting with Real Life Comparisons', in *Underwater Archaeology Proceedings from the Society for Historical Archaeology Conference*, 1990, T. Carrell (Ed.), 6-10, Society for Historical Archaeology (Germantown).

to conduct further analysis.[12] Second, particularly in the underwater context, excavation is an innately destructive practice and archaeologists accept that present technology will damage the layout and integrity of both site and data.[13] Finally, among other reasons, archaeologists are aware of the true long-term cost of care and conservation of raised collections.[14] Once submerged in the underwater environment, cultural sites and objects can eventually reach an 'equilibrium'; a peaceful state of harmony with their immediate environment – such as through the waterlogging of wooden materials, the protective layer of concretion on metallic objects, the coating of the site with protective layers of sand and sediment, and the reduction of oxygen and even microbial life – where, for non-ferrous materials at least, the long-term degradation is significantly slowed and preservation more easily assured.[15] When returned to the surface these objects, already having reached a fragile state of existence, are put through a second potentially fatal shock in their environment.[16] The cost and work required to ensure the long-term conservation of the *Vasa* ship, raised in Stockholm in 1961, and the Tudor war vessel, the *Mary Rose*, raised in Portsmouth in 1982, provide proof of the true cost of excavation.[17]

Archaeologists, however, are not the only preservationists. There are millions of members of civil society and other non-governmental groups who have a formal or informal interest in preserving UCH sites.[18] Such preservationists also value UCH for the historical information it provides. Like underwater archaeologists, they also cherish

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[12] Khakzad, S. and Van Balen, K., (2012), 'Complications and Effectiveness of In Situ Preservation Methods for Underwater Cultural Heritage Sites', 14(1-4) *Conservation and Management of Archaeological Sites* 469-478, at p. 471; Corfield, C., (1996), 'Preventive Conservation for Archaeological Sites', in *Archaeological Conservation and its Consequences: Preprints of the Contributions to the Copenhagen Congress*, 32-37, International Institute for Conservation of Historic and Artistic Works (London), at p. 33; Caple, C., (2016), *Preservation of Archaeological Remains In Situ*, Routledge (Abingdon).

[13] Supra n. 10, Hutchinson, at p. 288; Dromgoole, S., (2004), 'Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins', 28 *Marine Policy* 189-198, at pp. 194-195.

[14] Maarleveld, T.J., Guérin U. and Egger, B. (Eds.), (2013), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO (Paris), at pp. 179-200.

[15] Hamilton, D.L. and Smith, C.W., (2011), 'The Archaeological Role of Conservation in Maritime Archaeology', in *The Oxford Handbook of Maritime Archaeology*, B. Ford, D.L. Hamilton and A. Catsambis (Eds.), 286-304, Oxford University Press (Oxford); *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 809, 1985 AMC 609 (S.D. Ga. 1984); Coles, J.M., (1988), 'A Wetland Perspective', in *Wet Site Archaeology*, B.A. Purdy (Ed.), 1-14, Telford Press (New Jersey).

[16] Supra n. 8, Nautical Archaeological Society, at p. 149; UNESCO, (1995), *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, General Conference, 28th Session, (4 October 1995, Paris), UN Doc. 28C/39, at para. 31.

[17] Hocker, E., (2010), 'Maintaining a Stable Environment: Vasa's New Climate-Control System', 41(3) *APT Bulletin: Journal of Preservation Technology* 3-9, at pp. 7-8; Jones, M. (Ed.), (2011), *For Future Generations: Conservation of a Tudor Maritime Collection*, Mary Rose Publications: Volume 5, Mary Rose Trust (Portsmouth).

[18] Supra n. 15.

UCH for its aesthetic qualities, its linkages with our human, cultural and social history, for their personal or community identification with certain sites, and for the purposes of avoiding cultural homogeneity and preserving diverse heritage for our future generations.[19] Some "preservationists" may argue that underwater sites are of little use if they are decaying in dark and inaccessible depths, calling instead for the proper excavation of these sites so that the objects can be instead preserved in museums which are accessible to the international community.[20] This may be true at some point in time, when a UCH site's ex situ values eventually becomes greater than its in situ values. However, preservationists are aware of all the true costs of intervention or interference in any such valuations,[21] assuming a multiple-use perspective of UCH (see Section 3) and eschewing the idea that tangible or culturally significant objects are the only important element of the site. In addition to this, there is also the desire in many cases to protect UCH which might be linked with tragic loss of life as underwater gravesites, particularly for wrecks sunk in military service.[22] This compassion is demonstrated by the agreement signed between numerous European states to closely guard the wreck of the MS *Estonia* ferry which shockingly capsized when its bow doors burst open on a rough night in the Baltic Sea in 1994, leading to the deaths of 852 passengers and crew.[23]

ii. The opportunists

Opportunism is the term used here to describe what have been termed "treasure hunters" across much of the literature. Likened by cultural preservationists to modern-day pirates, it is true that any penetrative assessment of this community, including a critical analysis of the literature supporting their cause – being often written by US-based maritime

[19] Lipe, W.D., (1984), 'Value and Meaning in Cultural Resources', in *Approaches to the Archaeological Heritage*, H. Cleere (Ed.), 1-11, Cambridge University Press (Cambridge); Runyan, T.J., (1990), 'Shipwreck Legislation and the Preservation of Submerged Artifacts', 22 *Case Western Reserve Journal of International Law* 31-45, at pp. 31-32. See Section 3.

[20] Vadi, V., (2012), 'War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law', 37(2) *Tulane Maritime Law Journal* 333-378, at p. 355.

[21] Supra nn. 14-17; Cho, H., (2014), 'The Challenges and Needs of Museums in Safeguarding Underwater Cultural Heritage', 29(5) *Museum Management and Curatorship* 429-444.

[22] Williams, M., (2000), ''War Graves' and Salvage: Murky Waters', 5 *International Maritime Law* 151-158; Harris, J.R., (2001), 'The Protection of Sunken Warships as Gravesites at Sea', 7(1) *Ocean and Coastal Law Journal* 75-130; Jacobsson, M. and Klabbers, J., (2000), 'Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia', 69(3) *Nordic Journal of International Law* 317-332. Even wrecks which sank many centuries ago have contained human remains, such as HMS *Pandora* (sank in 1791), *Mary Rose* (sank in 1545) and the *Antikythera wreck* (sank 1st Century BC).

[23] *Överenskommelse med Estland och Finland om m/s Estonia*, 1995: SÖ: 36, (23rd February 1995, Tallinn), Swedish Ministry for Foreign Affairs, [Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia].

lawyers or entrepreneurs[24] – leads many to a conclusion that they are more interested in short-term profiteering. The practice of treasure hunting is still discernible in some maritime states, most notably the United States, and it is well-known for having been glamourised over many years by the media and popular culture.[25] Modern-day treasure hunters treat their work like any other commercial enterprise, distributing prospectuses to potential investors, employing PR agents, observing profit margins and selling shares on the stock exchange.[26] Despite the efforts of the industry to appear legitimate and selfless, it has been impossible to shed their image among cultural preservationists as being plunderers of communal heritage.[27]

Throughout the decades of debate over UCH protection laws there was a building collection of persuasive arguments from the treasure hunting community, emboldened by the laws of admiralty in pro-salvage common law countries, that their particular trade should be preserved under the rule of law. The following arguments are regularly made by the opportunists:

- That their activities are in keeping with the ius gentium and with the ancient laws of salvage, with the earliest reference in the Rhodian maritime codes of around 800 BC and upheld throughout under the laws of the sea ever since.[28]

- That there appears no good reason why archaeologists and salvors cannot work together.[29] This argument is most patent in the pro-salvage US admiralty courts where a salvor's award following the looting of an archaeological site is measured taking

[24] Forrest, C., (2008), 'Historic Wreck Salvage: An International Perspective', 33 *Tulane Maritime Law Journal* 347-379, at p. 348.
[25] Dromgoole, S., (2001), 'Law and the Underwater Cultural Heritage: A Question of Balancing Interests', in *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, N. Brodie and K.W. Tubb (Eds.), 109-136, Routledge (Abingdon), at p. 115; Bryant, C. R., (2001), 'The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks', 65(1) *Albany Law Review* 97-145, at p. 106.
[26] Supra n. 9, Fletcher-Tomenius and Forrest, at p. 4; Ibid., Bryant, at pp. 107-108.
[27] O'Keefe, P.J. and Nafziger, J.A.R., (1994), 'The Draft Convention on the Protection of Underwater Cultural Heritage', 25(4) *Ocean Development and International Law* 391-418, at p. 414.
[28] Regan, R., (2005), 'When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change', 29 *Tulane Maritime Law Journal* 313-351, at p. 321; Schoenbaum, T., (2012), *Admiralty and Maritime Law*, 5th Edn, West Academic Publishing (Eagan), at p. 208.
[29] Booth, F., (2006), 'The Collision of Property Rights and Cultural Heritage; the 'Salvors and Insurers' Viewpoints', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 293-299, Cambridge University Press (Cambridge).

account how closely the salvage observed principles of archaeological good practice.[30]

- That a large majority of UCH is slowly deteriorating, through both natural and anthropogenic pressures. References are often made to examples of sites experiencing accelerated degradation, such as the RMS *Titanic* or *Bismarck*, which have visibly deteriorated since their discoveries in the 1980s.[31] Similarly, references are made to sites exposed to threats from looting, such as the *Nan'ao No. 1* wreck in China,[32] or threatened by natural changes in the environment. An example of shifting natural threats being that of the HMS *Invincible* in the United Kingdom, for which an archaeological excavation was permitted once the site became exposed from shifting sediments.[33] The argument goes that since many such sites face decay, out-of-sight, they will never get to be enjoyed or appreciated by the international community.[34] Thus, by surfacing such sites we can enjoy the sites and their artefacts up close in the world's museums before they are gone. [35]

- They contend that archaeologists have good intentions, but they lack the public funding to properly study sites as and when excavation or recovery becomes necessary. By not being able to take immediate and effective action, they will only ever carry out substandard excavations at the eleventh hour.[36]

[30] Sometimes referred to as the '7th criterion' or '7th factor'. In the *Blackwall Case* (*The Blackwall*, 77 U.S. 1, 2002 A.M.C. 1808, 19 L. Ed. 870 (1869)), the United States Supreme Court laid out 6 factors to be considered when determining salvage award value. In 1992, the Fourth Circuit added the '7th factor' with regard to the *SS Central America*, saying that 'we would add another: the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved' (*Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d 450 (4th Cir. 1992)). Segarra, J.J.B., (2012), 'Above Us the Waves: Defending the Expansive Jurisdictional Reach of American Admiralty Courts in Determining the Recovery Rights in Ancient or Historic Wrecks', 43 *Journal of Maritime Law and Commerce* 349-391, at pp. 376-382.

[31] Varmer, O., (2006), 'RMS Titanic', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 14-16, ICOMOS (Paris), at p. 16; Garzke, W. H. and Dulin, R. O., (1994), 'The Bismarck's Final Battle', 30(2) *Warship International* 158-190.

[32] Hilgers, L., (2011), 'Pirates of the Marine Silk Road', 64(5) *Archaeology* 20-25.

[33] BBC News, 'HMS Invincible Shipwreck's Latest Artefacts Revealed', 7 June 2018, *BBC News*, (at: https://www.bbc.co.uk/news/uk-england-hampshire-44357695; accessed 1 June 2019).

[34] Supra n. 30, Segarra, at pp. 387-388; Nicholson, S.R., (1997), 'Comment – Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters', 66(1) *UMKC Law Review* 135-168, at p. 138.

[35] Supra n. 29, Booth, at pp. 296-297; Bordelon, C.Z., (2005), 'Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law', 7(1) *San Diego International Law Journal* 173-214, at p. 189.

[36] E.g., Supra n. 25, Bryant, at p. 129.

- Finally, some salvors cynically argue that archaeologists actually have an underhanded motive to encircle cultural property for their own profiteering once they secure sufficient public funding.[37]

(b) Preservationism v. Opportunism Across Admiralty Law

The law of salvage has been around as long as maritime law itself.[38] It is essentially a system of law rewarding mariners for rescuing property from the sea, whether flotsam, jetsam, lagan, or derelict.[39] In the common law tradition, salvage law normally provides for the legal owners of recovered materials to pay a reward, almost commensurate with market value, to the salvors. If the true legal owner cannot be found, as is often the case for uprooted old artefacts taken out of their archaeological context, then the state will assume title, from which it will sell to a museum or on the market, with the salvors being rewarded for the profit obtained. Today, however, there remain a number of common law states who continue to offer salvage awards for wreck of an archaeological nature, with the United Kingdom being one of the most notorious examples of a legal system which has yet to be brought up to the modern preservation-oriented standard.[40]

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[37] Referred to by McClaughlin as 'opportunity preservation' (McLaughlin, S.L., (1995), 'Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987', 19(3/4) *Columbia VLA Journal of Law and the Arts* 149-198, at pp. 189-192; Supra n. 25, Bryant, at p. 99.

[38] 'The law of salvage is of ancient vintage.' (Bederman, D.J., (1998), 'Historic Salvage and the Law of the Sea', 30(1) *University of Miami Inter-American Law Review* 99-129, at p. 103; Brice, G., (2012), *The Maritime Law of Salvage*, 5th Edn, Sweet & Maxwell (London), at p. 5; Supra n. 28, Regan, at p. 321.

[39] Flotsam: 'The wreckage of a ship or its cargo found floating on or washed up by the sea', Jetsam: 'Unwanted material or goods that have been thrown overboard from a ship and washed ashore, especially material that has been discarded to lighten the vessel', Lagan: 'goods or wreckage lying on the bed of the sea', Derelict: 'A ship or other piece of property abandoned by the owner and in poor condition' (Stevenson, A. (Ed.), (2010), *Oxford Dictionary of English*, 3rd Edn, Oxford University Press (Oxford)).

[40] Martin, J.B. and Gane, T., (2019), 'Weaknesses in the Law Protecting the United Kingdom's Remarkable Underwater Cultural Heritage: A Call for Modernisation and Reform', *Journal of Maritime Archaeology* (Forthcoming). See also, supra n. 3, Dromgoole, at p. 315; English Heritage, (2004), *Marine Archaeology Legislation Project*, School of Legal Studies, University of Wolverhampton (at: https://historicengland.org.uk/images-books/publications/marine-archaeology-legislation-project/marine-archaeology-legislation/; accessed 8 November 2018), at pp. 39-40; Yorke, R.A., (2011), 'Introduction: Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK – A JNAPC Perspective 21 Years On', in *Protection of Underwater Cultural Heritage in International Waters adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House November 2010*, R.A. Yorke (Ed.), 1-10, Joint Nautical Archaeology Policy Committee, (published by) Nautical Archaeology Society (Portsmouth), (at: http://www.jnapc.org.uk/UNESCO-Seminar-2010-final.pdf; accessed 8 November 2018), at pp. 3-4; Dromgoole, S., (1989), 'Protection of Historic Wreck: The UK Approach – Part II: Towards Reform', 4(2) *International Journal of Estuarine and Coastal Law* 95-116, at pp. 102-103. The Rolls of Oléron were a maritime code of admiralty brought to England by Eleanor of Aquitaine at the end of the 12th Century. These stood as a central feature in English salvage law ever since and, as a result of British domination of the seas from the 19th Century, have been highly influential upon maritime law around the world over the past two centuries – Senior, W., (1921), 'Early Writers on Maritime Law', 37(3) *Law Quarterly Review* 323-336, at pp. 326-327.

However, it is to the US courts of admiralty that most treasure hunters take their finds, and it is US judges who have developed unusual legal rules providing mechanisms by which submerged heritage can be 'salvaged' in an archaeological manner.[41] A key aspect of this US approach is its allusion to maritime codes of ancient civilisations which supported the law of salvage.[42] However, legal commentators and historians have argued clearly and cogently that this ancient salvage was only intended to preserve and protect contemporary objects from *immediate peril at sea*.[43] The code was thus to reward mariners who acted as salvors (offering "salvation" – 'the preservation or deliverance from harm, ruin, or loss'[44]) for returning objects at risk of loss to the depths. Never in these early maritime codes was consideration ever had of historic objects which are clearly no longer in 'marine peril' but, contrastingly, where there is a strong global public interest in keeping them in context or in their safer submarine environment.[45]

The US admiralty courts have therefore developed their own unique legal rules which permit traditional salvage practices on archaeological sites, with archaeological good practice being assessed by the courts when it comes to assessing an award following recovery.[46] There are many who rightly criticise this approach,[47] especially because

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[41] Marine peril 'includes peril of being lost through the actions of the elements' (*Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055 (5th Cir. 1980); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 557 & 660-661 (S.D. Fla. 1982); *Bemis v. R.M.S. Lusitania*, 884 F. Supp. 1042, 1051 (E.D. Va. 1995); Bederman, D.J. and Spielman, B.D., (2008), 'Refusing Salvage', 6 *Loyola Maritime Law Journal* 31-58, at p. 45; Supra n. 29, Booth, at p. 293; Supra n. 30, Segarra, at p. 378; Miller, M.L., (2006), 'Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel', 20(1) *Emory International Law Review* 345-396, at pp. 353-354.

[42] Supra n. 38; The Fifth Circuit has once put it that '[m]arine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation', explaining that every shipwreck 'is still in peril of being lost through the actions of the elements.' (*Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (1978)).

[43] Nafziger, J.A.R., (2003), 'The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck', 44(1) *Harvard International Law Journal* 251-270, at p. 252; Aznar, M.J., (2003), 'Legal Status of Sunken Warships "Revisited"', 9 *Spanish Yearbook of International Law* 61-101, at pp. 68-69; Supra n. 27, O'Keefe and Nafziger, at pp. 393 and 408; Supra n. 24, Forrest, at pp. 364-371; Supra n. 41, Miller, at pp. 357-358.

[44] The word "salvage" comes from Old French, *salver* meaning 'to save', from the Latin *salvātus* meaning 'made safe' (Stevenson, A. (Ed.), (2010), *Oxford Dictionary of English*, 3rd Edn, Oxford University Press (Oxford)).

[45] 'The advent of major treasure salvage is so recent that there simply is not applicable custom, let alone a jus gentium that addresses the unique phenomenon of underwater cultural heritage in any coherent way' (Supra n. 43, Nafziger, at p. 261).

[46] Supra n. 30. E.g., *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1985 AMC 2970 (11th Cir. 1985), 1515; *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1995 AMC 1682 (N.D. Cal. 1995), aff'd, 102 F.3d 379, 1997 AMC 315 (9th Cir. 1996), affd in part, vacated in part, and remanded on other grounds, 118 S. Ct. 1464, 1998 AMC 1521 (1998); *Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825 (S.D. Ga. 1997), 829.

[47] Varmer, O., (1999), 'The Case against the "Salvage" of the Cultural Heritage', 30 *Journal of Maritime Law and Commerce* 279-302, at pp. 296-297; Fletcher-Tomenius, P., O'Keefe, P. J. and Williams, M., (2000), 'Salvor in Possession: Friend or Foe to Marine Archaeology?', 9(2) *International Journal of Cultural Property* 263-314, at p. 298; C.f., Bederman, D.J., (1998), 'The UNESCO Draft Convention on

effective protection is only evaluated ex post destruction of cultural sites[48] and on the basis that commercially-focused admiralty courts are not familiar with or in any way sympathetic to fastidious archaeological practice.[49] Many may also feel that the two professions are diametrically opposed and incapable of integration.[50]

As a result, the number of litigations taking place in the US relating to the "salvage" of cultural heritage are many.[51] In one particularly famous judgment of the Fourth Circuit, Judge Niemeyer determined that, given its ancient origins, the application of salvage to submerged historic sites forms part of the ius gentium – the law of all nations.[52] Niemeyer somehow reached the conclusion that, were this 'venerable law of the sea' to come before a court in Canada or France, the determination would be the same.[53] This judgment has since been promoted by the commercial salvage and treasure hunting community as a sound analysis of customary international law.[54] However, numerous comparative law scholars have since responded with clear, consistent and credible evidence that treatment of submerged archaeological sites in this way is not widespread, but is only present within a small number of common law states.[55] In fact, a factually similar case in Canada adjudged that submerged heritage was not in 'peril', but rather that uprooting or recovering underwater artefacts without proper archaeological consideration, salvors would be *increasing* the risk of harm to property.[56] Indeed, this differing treatment of historical sites under the law of salvage appears to be practiced in most jurisdictions, for

Underwater Cultural Heritage: A Critique and Counter-Proposal', 30(2) *Journal of Maritime Law and Commerce* 331-354, at p. 344.

[48] Ibid.

[49] Ibid, Varmer, at pp. 296-297.

[50] E.g., Supra n. 6, Hall, 42-46; Supra n. 8, Nautical Archaeological Society, at pp. 7-8.

[51] Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 184.

[52] *RMS Titanic Inc v. Haver*, 171 F.3d 943 (4th Cir. 1999), at para. 960; Niemeyer, P.V., (2005), 'Applying Jus Gentium to the Salvage of the RMS Titanic in International Waters - The Nicholas J. Healy Lecture', 36(4) *Journal of Maritime Law and Commerce* 431-446.

[53] Ibid., *RMS Titanic v. Haver*, at paras. 960 and 966-967.

[54] Booth proposes that even opponents of treasure salvage law, such as James Nafziger, have conceded that this law forms part of the jus gentium (supra n. 29, Booth, at p. 293). However, Nafziger appeared to only acknowledge that the *approach* of the court, in taking a comparative perspective of international law, was 'well considered and significant'. He in fact alleges that the arguments made only seem to consider UK and US perspectives, with little confluence elsewhere (supra n. 43, Nafziger, at pp. 261 and 265).

[55] Supra n. 43, Nafziger, at p. 261; Supra n. 27, O'Keefe and Nafziger, at pp. 11-13.

[56] *Ontario v. Mar-Dive Corp* [1996] 141 D.L.R. (4th) 577, 638; Scovazzi, T., (2006), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at p. 288.

example Australia,[57] China,[58] France,[59] Ireland,[60] Spain,[61] Portugal,[62] South Africa,[63] Italy,[64] Tunisia[65] and Israel.[66]

Furthermore, the IMO 1989 International Convention on Salvage ('1989 Salvage Convention'),[67] which sought harmonisation of private laws of salvage, provided an explicit exemption to the application of salvage law to objects of an archaeological or historical nature.[68] A number of noteworthy states formally entered this reservation on adoption of the treaty,[69] including even the UK, one of the most notorious legal systems for leaving harbour to treasure hunters.[70] Scholars have also regularly emphasised how the US understanding of the law of salvage does not translate at all when crossing from common law states to systems with stronger civil law roots.[71] Thus, on any comprehensive study of the law of nations, the US views of archaeological salvage are

[57] Historic Shipwrecks Act 1976 (Australia), s. 13; *Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283.
[58] Regulation on Protection and Administration of Underwater Cultural Relics, State Council Decree No. 42, 20 October 1989, ss. 2 and 7; Zhao, H., (1992), 'Recent Developments in the Legal Protection of Historic Shipwrecks in China', 23(4) *Ocean Development and International Law* 305-333, at pp. 310 and 312.
[59] Decree No. 61-1547 on Maritime Wrecks (French Republic), Art. 24; Decree No. 89-874 on Maritime Cultural Property (French Republic), Art. 2.
[60] *King & Chapman v. The Owners & All Persons Claiming an Interest in La Lavia, Julilana, and Santa Maria de la Vision*, [1986] No. 11076, 11077, 11078 P (Ir. H. Ct. 1994).
[61] Ley 60/1962 (Boletin Oficial del Estado, No. 310, of 27 December 1962) (Spain), Art 22; Ley 16/1985 (Boletin Oficial del Estado, No. 155, of 29 June 1985) (Spain), Art. 44.
[62] Decreto Lei No. 164/97 of 27 June 1997, Establishing Standards for Underwater Cultural Heritage, Arts. 2 and 9.
[63] National Heritage Resources Act 1999, (No. 25 of 1999) (South Africa), Art. 3.
[64] Decreto Legislativo No. 490/1990 on Legislative Provisions for Cultural and Environmental Heritage (Italy), Art. 54.
[65] Loi No. 94-35, 24 February 1994 on a Heritage Code (Tunisia), Art. 23.
[66] Antiquities Law 1978 (No. 5738) (Israel), Art. 2(a).
[67] International Convention on Salvage, (adopted 28 April 1989 (London), in force 14 July 1996), 1953 UNTS 165.
[68] Ibid, 1989 Salvage Convention, Art. 30(1)(d).
[69] Australia, Bulgaria, Canada, China, Croatia, Ecuador, Estonia, Finland, France, Germany, Greece, Iran, Jamaica, Mexico, Netherlands, New Zealand, Norway, Poland, Russian Federation, Saudi Arabia, Spain, Sweden, Tunisia, Turkey, United Kingdom (International Maritime Organization, (2017), *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions*, 10 February 2017, IMO (London), at pp. 463-469).
[70] Supra n. 38, Brice, at p. 270; Forrest, C., (2011), *International Law and the Protection of Cultural Heritage*, Routledge (Abingdon), at p. 359.
[71] Supra n. 56, Scovazzi, at p. 288. For example, *sauvetage* in France and *salvataggio* in Italy relates more narrowly to offering assistance to ships in distress, whereas *récuperation* and *ricupero* relates to recovery of sunken ships and cargo. Further, *découvreur* and *ritrovamento* – the French and Italian equivalent to a legal 'find' – do not base themselves on purposeful treasure "seeking" but upon incidental discoveries (Drobnig, U., (1981), *International Encyclopedia of Comparative Law - Instalment 12*, U. Zweigert and U. Drobnig (Eds.), Martinus Nijhoff (Leiden), at p. 95; Ronzitti, N., (2012), 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law', in *Yearbook of the Institute of International Law - Volume 74 (Session of Rhodes, 2011)*, 130-177, Editions A. Pedone (Paris), at pp. 137-138).

neither widely accepted and, by contrast, are predominantly viewed as unethical and antithetical to the practices and principles of the majority of nations.

Turning to the other arguments from treasure hunters in favour of archaeological salvage, many insist that submerged shipwrecks are slowly deteriorating and, after adding other pressures such as incidental damage, looting, interference, and natural destruction, will eventually fade away with little opportunity to enjoy them.[72] Nevertheless, after initial reactions, many sunken vessels can eventually reach a relative equilibrium within their new submerged environments.[73] What happens to submerged sites over extended periods in fact depends on many variables such as the immediate physical, biological and chemical environment, as well as the composition of materials and their assemblage.[74] In general, however, wooden ships or organic UCH tend to be better preserved than ships made from steel and may be far better preserved in situ than ex situ. For example, the discovery of HMS *Erebus* and HMS *Terror* in September 2014 and September 2016, from Franklin's ill-fated Northwest Passage voyage nearly 170 years earlier, found both ships in pristine condition.[75] Similarly, there many examples even of wrecks from the Bronze Age which remain largely intact.[76] In situ preservation also tends to be cheaper and easier than ex situ.[77] Furthermore, even if a wreck were to slowly deteriorate over

[72] Supra n. 29, Booth, at p. 297.

[73] Quinn, R., (2006), 'The Role of Scour in Shipwreck Site Formation Processes and the Preservation of Wreck-Associated Scour Signatures in the Sedimentary Record – Evidence from Seabed and Sub-Surface Data', 33(10) *Journal of Archaeological Science* 1419-1432; Gregory, D., (1995), 'Experiments into the Deterioration Characteristics of Materials on the Duart Point Wreck Site: An Interim Report', 24(1) *International Journal of Nautical Archaeology* 61-65.

[74] Ward, I.A., Larcombe, P. and Veth, P, (1999), 'A New Process-Based Model for Wreck Formation', 26(5) *Journal of Archaeological Science* 561-570.

[75] Watson, P., 'Ship found in Arctic 168 years after doomed Northwest Passage attempt', 12 September 2016, *The Guardian*, (at: http://www.theguardian.com/world/2016/sep/12/hms-terror-wreck-found-arctic-nearly-170-years-northwest-passage-attempt; accessed 8 November 2018).

[76] The *Uluburun Shipwreck* is perhaps the oldest known shipwreck to be so well preserved and has been the subject of detailed archaeological analysis. It is estimated to have sunk in the 14th Century BC (Bass, G.F., (1986), 'A Bronze Age Shipwreck at Ulu Burun (Kas): 1984 Campaign', 90(3) *American Journal of Archaeology* 269-296). In October 2018, archaeologists also discovered a remarkably well-preserved Ancient Greek trading vessel in the Black Sea, believed to have sunk around the 4th Century BC (Rawlinson, K., 'World's Oldest Intact Shipwreck Discovered in Black Sea', 23 October 2018, *The Guardian*, (at: https://www.theguardian.com/science/2018/oct/23/oldest-intact-shipwreck-thought-to-be-ancient-greek-discovered-at-bottom-of-black-sea; accessed 8 November 2018).

[77] Gregory, D. and Manders, M., (Eds.), (2015), *Best Practices for Locating, Surveying, Assessing, Monitoring and Preserving Underwater Archaeological Sites, SASMAP Guideline Manual 2*, SASMAP (Amersfoort), (at: http://sasmap.eu/fileadmin/user_upload/temasites/sas_map/pdf/SASMAP_guideline_02_LR.pdf; accessed 8 November 2018); Manders, M., Oosting, R. and Brouwers, W., (2009), *MACHU Final Report – Managing Cultural Heritage Underwater Nr. 3*, Educom Publishers BV (Rotterdam), (at: http://publicaties.minienm.nl/documenten/machu-report-nr-3-final-report-managing-cultural-heritage-underw; accessed 8 November 2018); Ballard, R.D. and Durbin, M.J., (2008), 'Long-term Preservation and Telepresence Visitation of Cultural Sites Beneath the Sea', in *Archaeological Oceanography*, R.D Ballard (Ed.), 249-262, Princeton University Press (Princeton).

many centuries, many objects around the site will survive, leaving copious data to be analysed.[78] It is also increasingly feasible to halt or slow the deterioration of ferrous materials by technological measures, such as cathodic anodes or even antifouling agents, as well as other materials by polypropylene covers or artificial seagrass mats.

Nevertheless, it is true that all UCH faces a multitude of natural and anthropogenic threats which means that sites are likely to, at some point in time, become suitable for excavation or recovery before they disappear or are significantly degraded.[79] Although attracting global controversy, there are still many who agree with the decision of the Indonesian government to permit the archaeological excavation of an Arabian dhow found off Belitung, Indonesia, estimated to have sunk in 830 CE (*Belitung wreck*).[80] The hurried and poorly managed excavation of the site, and the dearth of academic analysis, has been roundly criticised by many archaeologists.[81] However, others have argued that once the location of the wreck had been revealed to the local community, the site was at daily risk of looting.[82] One curator appropriately responded by suggesting that the site's placement within a poorer socioeconomic context should not be a justification for incompetent archaeology.[83]

The *Belitung* therefore points to two conclusions. First, in cases where a site is at genuine risk from looting, incidental damage or other threats of deterioration, and only where there is credible evidence supporting this, then it may become suitable for archaeological recovery. Second, and equally importantly, where such a recovery is being considered, detailed evaluation must then be made of the archaeological rigour and academic integrity of the proposed research project, to ensure that it is not merely 'academic' or

[78] O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at p. 122.
[79] Supra n. 6, Hall, at pp. 34-36.
[80] Coleman, P., (2013), 'UNESCO and the Belitung Shipwreck: The Need for a Permissive Definition of Commercial Exploitation', 45 *George Washington International Law Review* 847-874; Supra n. 13, Dromgoole, at p. 194; Ziglar, K., 'Media Backgrounder: Discovery, Recovery, Conservation and Exhibition of the Belitung Cargo', 16 March 2011, Freer Gallery of Art and Arthur M. Sackler Gallery, Smithsonian Institute (Washington), (at: http://archive.asia.si.edu/press/2011/prShipwreckedBackgrounder.asp; accessed 18 November 2018).
[81] Bartman, E., (2011), *Statement on Belitung Shipwreck*, President of the AIA, 8 June 2011, Archaeological Institute of America (Boston), (at: https://www.archaeological.org/news/advocacy/5260; accessed 18 November 2018); Gongaware, L., (2013), 'To Exhibit or Not to Exhibit: Establishing a Middle Ground for Commercially Exploited Underwater Cultural Heritage under the 2001 UNESCO Convention', 37(1) *Tulane Maritime Law Journal* 203-230, at pp. 221-223.
[82] Supra n. 80.
[83] Johnston, P.F., (2011), (quoted in: Caixia, L., (2011), 'The Belitung Shipwreck Controversy', No.58 *IIAS Newsletter* 41, International Institute of Asian Studies (Leiden), (at: https://www.iseas.edu.sg/images/centres/nalanda_sriwijaya_centre/documents/belitung_controversy.pdf; accessed 18 November 2018)).

archaeological as a façade for an otherwise profit-seeking motive.[84] This includes the rule, as placed within the Rules to the UNESCO Convention, that such projects can never be funded out of the sale of the artefacts raised.[85] On this second ground, the archaeological community is right to maintain its criticism of the Asia Society Museum in New York for its continued display of esteemed *Belitung* patrimony.[86]

The same can be said for the ongoing defence by *Odyssey Marine Exploration* of its plans to excavate the HMS *Victory* (1744) along with its cargo of gold and silver valued at several hundred million dollars.[87] While there are plausible grounds to suggest that the site may be at risk from trawling and looting, the lack of a rigorous archaeological project design and the insidiously commercial profit-oriented motivation of the 'salvors', makes it a wholly unsuitable case for early recovery without a more transparent, non-commercially exploitative and public benefit-driven archaeological project design.[88] In each individual case, therefore, there will always need to be a balancing out of the potential costs and benefits of each option and, as a site becomes increasingly threatened, there is an increasing likelihood that its value would be better preserved for future generations by recovery rather than leaving it undisturbed.[89]

Distinct from these "treasure salvors", are the bona fide and uncontroversial commercial salvage sector who still maintain a legitimate industry contracting with operators to recover materials and wrecks recently lost at sea.[90] Therefore, if a site does become vulnerable and becomes a suitable case for excavation, then there is a plausible contention that the technological capabilities, expertise and experience of salvage companies makes them a suitable private contractor to work under the direction of archaeologists.[91]

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[84] Johnston, P.F., (1993), 'Treasure Salvage, Archaeological Ethics and Maritime Museums', 22 *International Journal of Nautical Archaeology* 53-60, at p. 59.
[85] Supra n. 1, UNESCO Convention, Annex I: Rules Concerning Activities Directed at Underwater Cultural Heritage, Rules 2 and 17.
[86] E.g., Watson, T., (2017), 'Show of Shipwrecked Treasures Raises Scientists' Ire', 6 February 2017, 542 *Nature* 150.
[87] Brockman, A., (2018), UK Government Denies Maritime Heritage Foundation/Omex Permission to Salvage HMS Victory 1744', 16 September 2018, *ThePipeline*, (at: http://thepipeline.info/blog/2018/09/16/uk-government-denies-maritime-heritage-foundation-omex-permission-to-salvage-hms-victory-1744/; accessed 18 November 2018).
[88] Joint Nautical Archaeology Policy Committee, (2010), *HMS Victory 1744: Options for the Management of the Wreck Site - A Public Consultation by the Ministry of Defence and the Department for Culture, Media and Sport: Response by the Joint Nautical Archaeology Policy Committee*, June 2010, JNAPC (York), (at: http://www.jnapc.org.uk/HMSVictory-Response-JNAPC-June-2010.pdf; accessed 18 November 2018).
[89] See Section 3 below.
[90] E.g., See the *International Salvage Union* (at: http://www.marine-salvage.com; accessed 18 November 2018).
[91] Supra n. 13, Dromgoole, at p. 196.

However, as should be clear from the multiple-value model of UCH management in Section 3, publicly-regulated archaeologists or conservators should henceforth become the principal decision-makers in all activities directed at UCH, with salvors only having permission for involvement as benign subcontractors in the provision of expertise, equipment and labour.[92] Most importantly, their contract fee should never be dependent on the commercial value of the site or above market value for such salvage services.[93]

The *law of finds*, being another system of property rights found in common law jurisdictions, has also impacted on UCH.[94] It is similar to, and often confused with, the law of salvage.[95] The key difference is that the law of finds will award the object's discoverer with ownership, given that no one else can lay proper claim to its title, whereas salvage awards the finder with a monetary reward for returning the object to its owner, whether that be a proper claimant showing good title or the state in default.[96] The law of finds was once a significant threat to UCH, given that the United States courts would use it to reward many treasure hunters. The Abandoned Shipwrecks Act 1987 was therefore introduced to curtail this practice by ensuring that all abandoned wrecks within 3 miles of US waters had title, being the neighbouring US State in default.[97] However, it did not work effectively given that claimants simply reverted to *salvage* law and argued such vessels were not positively abandoned.[98] Nevertheless, fortunately, the law of finds now tends to be removed or neutralised in the context of UCH across most jurisdictions.

[92] Supra n. 47, Varmer, at p. 296.
[93] '[A]rchaeological activity can be governed by commercial principles, as long as the activities are authorized in conformity with the Convention, and as long as the finds that belong to the site are not part of the commercial equation.' (Supra n. 14, Maarleveld, Guérin and Egger, at p. 34; Supra n. 8, Nautical Archaeological Society, at p. 7).
[94] The infamous Treasure Hunters I case, relating to the *Nuestra Señora de Atocha*, represented the pinnacle of use of the law of finds for wrecks in the US and triggered the Abandoned Shipwrecks Act 1987 (*Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 408 F. Supp. 907 (D. Fla. 1976), aff'd, 569 F.2d 330 (5th Cir., 1978)); Lipka, L.J., (1970), 'Abandoned Property at Sea: Who Owns the Salvage "Finds"?', 12(1) *William and Mary Law Review* 97-110.
[95] DuClos, J.S., (2007), 'A Conceptual Wreck: Salvaging the Law of Finds', 38(1) *Journal of Maritime Law and Commerce* 25-38.
[96] Wilder, M.A., (2000), 'Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries', 67(1) *Defence Counsel Journal* 92-105, at pp. 92-93.
[97] Abandoned Shipwrecks Act 1987, 43 U.S.C. §§ 2101 et seq (United States), ss. 2105(a) and (c).
[98] Supra n. 51, Dromgoole, at p. 188; *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir., 1992); *Deep Sea Research, Inc v. Brother Jonathan*, 102 F. 3d 379 (9th Cir., 1996); *Yukon Recovery LLC v. Certain Abandoned Property (SS Islander)*, 205 F.3d 1189 (9th Cir., 2000) cert. denied, 531 US 820, 121 S. Ct. 62 (2000).

(c) Preservationism v. Opportunism in Private International Law

Predictably, *private international law* also plays a central guiding role in the protection of UCH. As with all areas of private international law, most cases fall on their individual merits and every judicial arbiter will determine competence differently. The constitutive rules used by courts to allocate jurisdiction are the same for broad generic categories and based on questions of nationality, residence, situs, registration, and so on, regardless of whether the subject is cultural or not.[99] However, beyond these formal and technical rules used by national courts, there is one unusual jurisdictional aspect of UCH. Typically, the standard means by which a state can regulate UCH is either: (i) flag state jurisdiction, over one's own vessels; (ii) territorial jurisdiction, over UCH sites in one's territorial waters or, in the case of Articles 9 and 10 of the UNESCO Convention (in conjunction with Articles 56 and 77 of the LOSC), indirect jurisdiction over UCH in the continental shelf or EEZ;[100] or (iii), personal jurisdiction, over the actions of one's own nationals. However, UCH resting on the deep seabed effectively sits in "no man's land" – without territory and often without clear owner – making it difficult for a national court to determine jurisdiction over the UCH in question.[101]

On this matter, the United States courts have famously assumed an extraterritorial authority over such wrecks.[102] If Judge Niemeyer was correct about anything in *RMS Titanic Inc v. Haver*,[103] it was in highlighting the jurisdictional quandary presented by the wreck site.[104] *Titanic*, at that time presumed to be resting on the deep seabed, was effectively in an 'anational' territory.[105] Prior to the *Titanic* judgment, the Fifth Circuit had assumed 'quasi' in rem jurisdiction over the *Atocha* wreck – some 30 nautical miles off the US coast – on the basis that it was competent to adjudge on the personal jurisdiction *between* the two parties, thus exempting any third parties outside of US

[99] See generally, Roodt, R., (2015), *Private International Law, Art and Cultural Heritage*, Edward Elgar (Cheltenham); Prott, L.V., (1989), *Problems of Private International Law for the Protection of the Cultural Heritage*, Martinus Nijhoff (Leiden).
[100] See Chapter 3, Section 1.
[101] Miller, G.L., (1992), 'The Second Destruction of the Geldermalsen', 26(4) *Historical Archaeology* 124-131, at p. 128.
[102] Murphy, S.D., (2000), 'Contemporary Practice of the United States Relating to International Law, 94(1) *American Journal of International Law* 102-139, at p. 125.
[103] Supra n. 52, *RMS Titanic v. Haver*.
[104] Ibid, at p. 966.
[105] It appears now that the Titanic wreck is within Canada's claimed outer continental shelf (coordinates calculated by referring to Government of Canada, (2013), *Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Atlantic Ocean—Executive Summary*, FR5-82/1-2013E, Foreign Affairs, Trade and Development Canada (Ottawa), (at: http://www.un.org/depts/los/clcs_new/submissions_files/can70_13/es_can_en.pdf; accessed 18 November 2018).

jurisdiction.[106] Taking this further, in the SS *Central America* case, the court was able to assert 'constructive' in rem jurisdiction over the wreck which lay some 140 nautical miles off the US coast, on the basis of lumps of anthracite brought before the court.[107] Although, again, here it was acknowledged that jurisdiction was only as between the parties.[108] However, in the *Titanic* case the US courts went yet further. Here, the treasure salvors, RMS Titanic Inc., were seeking exclusive and perpetual salvor-in-possession status over a 5.2km^2 debris field, resting at a depth of 3.8km around 800 nautical miles distant from the US baseline, on the basis of a few artefacts brought before the court. By ultimately awarding *exclusive* salvor-in-possession status over the whole wreck, the Fourth Circuit's award was alleged to stand against all claimants in the world, through the "constructive" possession of the wreck based on a few raised objects.[109] Judge Niemeyer was particularly minded that some national court must be able to accept a petition, otherwise the wreck would remain permanently outside the law.[110]

The decision to accept jurisdiction in the *Titanic* case has been praised by many.[111] For without such jurisdiction, the wreck might be left without an applicable legal system and beyond international treaties and comity.[112] The issue, however, is surely that the US courts accepted jurisdiction for the purposes of legitimising salvage activities directed at *Titanic*, despite mounting international academic and judicial commentary arguing in

[106] The plaintiffs do not 'have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties…to this litigation' (*Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel* 569 F.2d 330 (5th Cir., 1978), at paras. 333-336); *State of Florida v. Treasure Salvors, Inc.* 621 F2d 1340 (5th Cir., 1980), at para. 1347; '[T]he adverse parties in this situation are the competing salvors. Thus, since the court has jurisdiction over them, and the subject matter[,] the court is fully competent to adjudicate the dispute regardless of the location of the salvage operations.' (*Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir., 1981), at paras. 567-568). Note also the dissenting judgment of Rubin J, who said that '[t]here are indeed res that lie beyond the jurisdiction of any court to determine in rem ownership' (at para. 1352). N.B., The first use of such in rem jurisdiction over wrecks *within* national jurisdiction appears to date back to the *Brig Ann* case 13 U.S. (9 Cranch) 289 (1815), (supra n. 30, Segarra, at p. 365).

[107] *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va., 1990), at paras. 1331 and 1333-1334.

[108] Ibid, at para. 1334

[109] '[W]e believe that the jus gentium authorizes an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty' (per Niemeyer J, supra n. 52, *RMS Titanic v. Haver*, at para. 967). This decision was affirmed also in *Odyssey Marine Exploration, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel* 727 FSupp.2d 1341 (M.D. Fla., 2010), at para. 1346.

[110] Supra n. 52, *RMS Titanic v. Haver*, at paras. 968-969; Supra n. 52, Niemeyer; Nafziger (supra n. 43, at p. 259) points out that the court was likely persuaded by arguments made by Alexander (in Alexander, B.E., (1989), 'Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations', 20(1) *Journal of Maritime Law and Commerce* 1-20, at p. 5).

[111] Supra n. 30, Segarra; Supra n. 43, Nafziger, at p. 260; Supra n. 41, Miller, at pp. 386-387; Stern, J.S., (2000), 'Smart Salvage: Extending Traditional Maritime Law To Include Intellectual Property Rights in Historic Shipwrecks', 68(6) *Fordham Law Review* 2489-2542, at pp. 2500-2501.

[112] Ibid.

favour of non-interference.[113] This argument is all the more acute when the activities are conspicuously private and commercial in nature. The court did therefore attempt to take their purported 'sensitive approach', by softening the aspects of US salvage law which might contravene the values and laws of other nations.[114] For example, such a compromise of the Fourth Circuit was to attach conditions and covenants requiring that the artefacts raised remain kept together and properly conserved as a single collection for study and analysis, as well as available for public access and enjoyment.[115] However, given the strong global sentiments in favour of protecting such sites in situ and of moving away from an economic object-oriented perspective of underwater heritage, even this watered-down US 'archaeological salvage' approach is probably beyond the supposed ius gentium.[116]

While case law on this question outside the US territory has been scant,[117] it is interesting to note an alternative perspective of the English courts in the *Lusitania* case.[118] Here, the court determined that the Crown's prerogative to claim title to unclaimed wreck in UK territorial waters, as it was under Section 523 of the Merchant Shipping Act 1894, does not apply to wrecks originating from outside UK waters.[119] While being concerned mostly with statutory interpretation rather than jurisdictional rules, the case is interesting for its inference that the English laws of salvage are only intended for UK-based wreck. The sad result is that such wreck from outside the UK's narrow territorial sea effectively becomes res nullius and arguably open to unrestricted exploitation.[120] In so many words, the international position on jurisdiction over ocean-based wreck remains unclear. The US courts effectively welcome applications from foreign salvors, over foreign wreck,

[113] Supra n. 24, Forrest, at pp. 354-355.
[114] Supra n. 41, Miller, at p. 385; Supra n. 43, Nafziger, at p. 264.
[115] The court (supra n. 52, *RMS Titanic v. Haver*, at para. 969) noted with approval the judgment of the district court which awarded RMST salvage on the basis that they were not "selling" the artefacts, in *RMS Titanic Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va., 1996), at paras. 718 and 723.
[116] Schoenbaum, T. and McClellan, J., (2012), *Schoenbaum and McClellan's Admiralty and Maritime Law*, 5th Edn, Hornbook Series, West Academic (Eagan), at p. 856; Doran, K., (2011), 'Adrift on the High Seas: The Application of Maritime Salvage Law to Historic Shipwrecks in International Waters', 18(2) *Southwestern Journal of International Law* 647-666, at p. 657; Wright B., (2008), 'Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks', 33(1) *Tulane Journal of Maritime Law* 285-312, at p. 311.
[117] See generally, supra n. 30, Segarra.
[118] *Pierce v. Bemis* [1986] 1 All ER 1011.
[119] The Lusitania wreck is 15 nautical miles south of the Old Head of Kinsale, Ireland.
[120] Timmermans, D. and Guerin, U., (2015), *Heritage for Peace and Reconciliation: Safeguarding Underwater Cultural Heritage of the First World War; Manual for Teachers*, UNESCO Publishing (Paris), at p. 124; Supra n. 39, Marine Archaeology Legislation Project, at p. 57; See generally, supra n. 51, Dromgoole, at pp. 96-118.

found in foreign waters;[121] while most jurisdictions could continue to rely on narrow forms of vessel, personal and territorial forms of jurisdiction.

(d) Preservationism v. Opportunism in National Law

Two important elements of national private law which have an impact upon UCH are contract and property law. The UNESCO Convention has the advantage of being able to neatly slot into the existing international regime protecting against the illicit trade in stolen or clandestinely excavated antiques and artefacts.[122] The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provided critical changes across state public law regimes, by attempting to address cross-border trade in illicit cultural property.[123] From this, decades of improvements to private laws across jurisdictions have attempted to curtail and prosecute cases of trade in stolen cultural property, largely bolstered by the UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects, which was intended to bring private laws into line.[124] These ever-improving domestic laws on cultural property assist in protecting UCH by outlawing, and in most cases providing for criminal prosecution for carrying out, trade in cultural property which is stolen. Furthermore, given that so many jurisdictions now punish offenders, including even confiscating goods from good faith purchasers and returning them to their original

[121] Supra n. 56, Scovazzi, at p. 287; Supra n. 51, Dromgoole, at p. 184.

[122] Maarleveld, T.J., (2006), 'A Perspective from Across the Channel', in *The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of Burlington House Seminar October 2005*, R.A. Yorke (Ed.), 19-22, Joint Nautical Archaeology Policy Committee, (published by Nautical Archaeology Society (Portsmouth)), (at: http://www.jnapc.org.uk/Burlington%20House%20Proceedings%20final%20text.pdf; accessed 18 November 2018), at p. 20; Strati, A., (1999), *Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary Prepared for UNESCO*, UN Doc. CLT-99/WS/8, UNESCO (Paris), at paras. 85-88.

[123] For example, Article 8 of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property (adopted 14 November 1970; entered into force 14 April 1972) 823 UNTS 231 (Paris)) calls upon states to impose penalties against its citizens who import cultural property which has been illicitly exported from the country of origin; Prott, L.V., (1983), 'International Control of Illicit Movement on the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives', 10(2) *Syracuse Journal of International Law and Commerce* 333-351, at p. 339. See generally, Askerund, P. and Clément, E., (1997), *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention*, UN Doc. CLT-97/WS/6, UNESCO (Paris).

[124] Fincham, D., (2008), 'How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property', 32(1) *Columbia Journal of Law and the Arts* 111-150, at p. 234; Kinderman, S.A., (1993), 'The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property', 7(2) *Emory International Law Review* 457-584, at pp. 461-462.

owners, such 'hot' property is increasingly unattractive to most auction houses and dealers.[125]

All states also have public or private laws which more clearly regulate the protection of submerged cultural heritage. Despite varying idiosyncrasies, a comparative perusal across the regulatory landscape highlights many similarities and patterns of cross-fertilisation.[126] Commonly, there are often laws in place to protect wrecks of a significant or historical nature, both inland and within the territorial sea.[127] Some common law states adopt a "listing-based" approach, which seeks protection of sites on the basis of perceived significance.[128] Most jurisdictions, however, including civil law states,[129] Scandinavian states,[130] Australia,[131] and Ireland,[132] utilise a blanket-based approach, providing a base level protection for all submerged heritage over a certain age or regulating specific activities.[133] These blanket-based mechanisms are less 'reactive', usually do not interfere with any laws on ownership, and can also still offer additional protections for specifically identified wrecks.[134] A combined approach such as this, as used in Australia, is perhaps the best method.[135] Indeed, the UK approach of listing of 52 protected wrecks (as at

[125] Blake, J., (2015), *International Cultural Heritage Law*, Oxford University Press (Oxford), at p. 68; C.f., MacKenzie, S.R.M., (2005), 'Dig a Bit Deeper: Law, Regulation and the Illicit Antiquities Market', 45 *British Journal of Criminology* 249-268.

[126] See generally, Dromgoole, S. (Ed.), (2006), *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, 2nd Edn, Martinus Nijhoff (Leiden).

[127] Some jurisdictions however apply these laws up to the contiguous zone (24-nautical miles) or up to the outer limits of the EEZ or continental shelf (see Chapter 3, Section 1).

[128] A well-known example is the Protection of Wrecks Act 1973 (c. 33) in the United Kingdom.

[129] Dromgoole, S., (2003), '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 18(1) *International Journal of Marine & Coastal Law* 59-108, at p. 64. For example, France (Law No. 89-874) and Netherlands (The Monument and Historic Buildings Act 1988).

[130] For example, Denmark (The Protection of Nature Act 1992, 3 January 1992, No. 9), Norway (The Cultural Heritage Act 1979, Act of 9 June, No. 50), and Sweden (Act Concerning Ancient Monuments and Finds, 30 June 1988).

[131] Historic Shipwrecks Act 1976 (Australia).

[132] National Monuments (Amendment) Act 1987, No.17 (Republic of Ireland).

[133] For example, in Netherlands (supra n. 129) the limit is 50 years since submergence, Australia (supra n. 131) it is 75 years, in Ireland, Sweden and Denmark (supra nn. 130 and 132) it is 100 years, whereas in Norway (supra n. 130) it is actually 100 years since the UCH objects themselves were created. In some states, such as Greece and Turkey, the concern is more clearly with ancient heritage (supra n. 51, Dromgoole, at p. 70), therefore, for example in Greece, automatic protection is afforded to all sites wrecked before 1453 (Forrest, C., (2002), 'A New International Regime for the Protection of Underwater Cultural Heritage', 51(3) *International Comparative Law Quarterly* 511-554, at p. 524).

[134] Supra n. 51, Dromgoole, at p. 92; Del Bianco, H.P., (1987), 'Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure', 5(1) *Boston University International Law Journal* 153-176, at p. 171; Henderson, G., (2001), 'Significance Assessment or Blanket Protection?', 30(1) *International Journal of Nautical Archaeology* 3-4, at p. 3.

[135] UK UNESCO 2001 Convention Review Group, (2014), *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom – Final Report*, United Kingdom National Commission for UNESCO (London), (at: https://www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf; accessed 18 November 2018), at p. 65; Luxford, D., (2006), 'Finders Keepers Losers Weepers – Myth or Reality? An Australian Perspective on

writing), while many thousands of archaeological sites remain unprotected and open to commercial salvage, is prone to considerable weakness.[136]

Committed state protection has perhaps been most ostensible in states, such as China[137] or South Africa,[138] who have asserted state ownership and stewardship of all wrecks in their waters, regardless of actual ownership.[139] The Chinese 1989 Regulation on Protection and Administration of Underwater Cultural Relics is in fact an unusual example of national legislation which asserts extraterritorial jurisdiction over wrecks outside of its claimed area of competence, by alleging state rights over all vessels of possible Chinese origin, even in other states' territorial seas.[140] The UK provides another unusual example of extraterritorial UCH regulation. Under the Protection of the Military Remains Act 1986 (PMRA), inter alia, the Ministry of Defence is responsible for listing sunken UK war vessels which are to be treated as either protected or restricted sites.[141] This includes the listing and regulation of sites, wherever they may be located, including in other states' territories.[142] This legislation uses a combination of personal and flag state jurisdiction, therefore applying to UK natural persons and vessels, as well as port state jurisdiction, controlling any property brought back into the UK.[143] However, there is no legal obligation on other states to observe the UK's PMRA outside the UK's territorial waters and securing such cooperation is unlikely to be easy.[144]

Most states also have *cultural property* or *environmental laws* which contain references or provide indirect protection to submerged heritage.[145] Just as an example, in England & Wales, the Ancient Monuments and Archaeological Areas Act 1979 provides for the scheduling and protection of monuments and archaeological sites, including those on or

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Historic Shipwreck', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 300-307, Cambridge University Press (Cambridge), at p. 301.

[136] Supra n. 40, Yorke, at p. 4; Supra n. 40, Marine Archaeology Legislation Project, at pp. 38-40.

[137] Law of the People's Republic of China on the Protection of Cultural Relics, (adopted at the 25th Meeting of the Standing Committee of the Fifth National People's Congress on 19 November 1982).

[138] National Heritage Resources Act 2000, (No. 25 of 1999), (South Africa).

[139] Forrest, for example, has pointed out the problems that such legislation creates (Forrest, C., (2006), 'South Africa', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 247-270, Martinus Nijhoff (Leiden), at p. 260).

[140] Supra n. 137, Law of the People's Republic of China on the Protection of Cultural Relics, ss. 2(2), 2(3) and 3; Zhao, H., (1992), 'Recent Developments in the Legal Protection of Shipwrecks in China', 23(4) *Ocean Development and International Law* 305-333, at pp. 315-325.

[141] Protection of Military Remains Act 1986 (1986, c. 35), (United Kingdom), s.1(2).

[142] Ibid, Protection of Military Remains Act, s.3(1).

[143] Supra n. 3, Dromgoole, at p. 329.

[144] Dromgoole S. and Gaskell, N., (1993), 'Who Has a Right to Historic Wrecks and Wreckage?', 2(2) *International Journal of Cultural Property* 217-274, at p. 227.

[145] See supra n. 126, Dromgoole.

in the seabed up to the outer limits of the territorial sea.[146] Proper protection of the maritime cultural or natural environment is also built into the important Marine and Coastal Access Act 2009 (MCAA), such as requiring that many licensable activities in the UK's territorial waters and EEZ require ex ante impact assessments from the Marine Management Organisation, working in consultation with scientific advisory bodies such as Historic England, to determine ways to minimise any adverse impact on the cultural or natural environment.[147] The UK's 2008 Marine Policy Statement also directs public authorities towards the protection of UCH.[148]

As has been demonstrated in this Section, there are a number of laws in place to protect UCH beyond the inter-state bargaining undertaken through the UNESCO Convention. This includes both private and public laws, as well as private international laws or laws of admiralty which have an impact across jurisdictional boundaries. It should be clear from the analysis that, while the UK was often chosen as an example jurisdiction, each national legal system has its own idiosyncrasies and approaches to the protection of UCH. Indeed, one question of particular variability is the question of ownership of wrecks once they become submerged, as well as questions relating to inferred or express abandonment over time. Such is the complex variety of opinion on this that the UNESCO Convention negotiations sought to avoid the subject altogether and allow variations in national law to continue.[149]

3. A Multiple-Value Approach to Underwater Cultural Heritage

(a) The Gradual Shift to a Multiple-Value Understanding of Underwater Cultural Heritage

Balancing conflicting perspectives on the optimum means to manage UCH, as explored above, has implicated diverse value groups, such as archaeologists, treasure hunters, wreck divers, fisheries, commercial ocean users, local and national government, and civil society. Occasionally, commentators have noted the possibility of seeing UCH from a multiple-use perspective, by underscoring the multiple 'uses' of UCH across these diverse

[146] Ancient Monuments and Archaeological Areas Act 1979 (1979, c. 46), s.53.
[147] Marine and Coastal Access Act 2009, (2009, c. 23), ss. 54(4), 117(8), 151(8)(b) and s.197(6ZA).
[148] HM Government, (2011), *UK Marine Policy Statement*, March 2011, HM Government Stationery Office (London), (at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf; accessed 18 November 2018), at para. 1.2.3.
[149] Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 424.

stakeholders. However, up to now there has been a lack of effective academic analysis on what such a multiple-use model for UCH management might actually mean or how it could enhance its protection. This section argues that instead of viewing UCH as a multiple "use" resource, focused on its practical utility, an approach should be adopted in line with developments in heritage literature generally, recognising the multiple and abstract "values" of UCH. Indeed, there is a close similarity between a multiple-use and a multiple-value model, although *values* is perhaps broader and emphasises all forms and types of enjoyment which can be derived by UCH, even if the consumer never even comes into contact with, i.e., *uses*, the heritage. Introducing a multiple-value approach not only informs the following section, which appraises how well the UNESCO Convention adopts a multiple-value approach to resolving the preservationism v. opportunism debate; but also sets up Chapter 4, which explores the challenges of ensuring national compliance with commitments to protect such multiple (and inherently transnational) values.

An early reference to a potential multiple-value understanding of UCH can be found in the negotiations by the International Law Association, in 1992, on a draft instrument for the international protection of UCH before it was subsequently forwarded to UNESCO. Here, according to Fletcher-Tomenius and Forrest, the Committee were 'aware of other interests in this resource, and conceded in 1991 that provision had to be made for the interests of divers and salvors'.[150] According to O'Keefe and Nafziger, it also 'became questionable whether the convention should attempt to incorporate *all* of these and possibly other values, at the risk of diluting the chief effort to conserve the cultural heritage'.[151] Another embryonic and early multiple-use approach was that suggested by Strati in 1995, which appeared to limit the interest in UCH to identifiable owners, archaeologists, commercial salvors, hobby-divers, collectors, auctioneers, and the nation states claiming links to the heritage.[152]

In April 1999, both Varmer and Nafziger wrote articles discussing the future treatment of UCH through a multiple-use approach.[153] However, Nafziger again appeared to equate the multiple interests in UCH as an argument in favour of reconciling the incompatible

[150] International Law Association, (1993), *Report of the Sixty Fifth Conference, Held at Cairo, Egypt, 21 to 26 April 1992*, International Law Association (London), at p. 339.
[151] Supra n. 27, O'Keefe and Nafziger, at p. 394.
[152] Strati, A., (1995), *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, Martinus Nijhoff (Leiden), at pp. 19-20.
[153] Supra n. 47, Varmer, at pp. 287-294; Nafziger, J.A.R., (1999), 'The Titanic Revisited', 30(2) *Tulane Journal of Maritime Law and Commerce* 311-330, at pp. 326-328.

practices of salvage and archaeology.[154] One of the more thorough approaches, however, was perhaps that demonstrated by Varmer, who noted the diverse interests in preserving UCH, the benefits of preservation for present and future generations, and the applicability of a precautionary approach.[155] As he puts it, '[m]ultiple users of the UCH include (in addition to the general public at large) researchers, educators, sport divers, fishermen, boaters, museums, commercial salvors and their investors, owners and insurers of the wreck (including its cargo), journalists, tourist companies, and the family and descendants of those who lost their lives and for whom the wreck site is a final resting place. Most of these user groups benefit from on-site protection of the UCH.'[156] Yet again, however, he principally applied the multiple-use model to resolve the binarily opposed values of treasure salvors and archaeologists.[157]

The view that a multiple-use approach is simply a system for reconciling the binary interests of salvors and archaeologists continued in the subsequent decade. For example, in 2000, Fletcher-Tomenius and Forrest stressed the importance of seeing the diverse and multiple attachments to decisions impacting upon UCH. However, they felt that a failure to consider the interests of treasure salvors will only drive them to subvert the law.[158] Similarly, Scrimo in 2000 and Cohan in 2004, both alluded to numerous interests in the preservation of UCH, but came to the similarly dubious conclusion that such a multiple-use approach would merely focus upon reconciling commercial salvage and archaeology.[159] In his customary pro-treasure hunting stance, Bederman goes so far as to suggest the multiple-use model leads to a preference for early recovery above in situ management.[160] Smith and Couper also touched upon the multiple values co-existent in UCH in 2003, particularly from a state-based perspective, as well as noting the need for an 'integrated management' response.[161] However, again they do not expand on this and, once more, come to the narrow conclusion that the multiplicity of diverse interests in

[154] Ibid, Nafizger, at pp. 326-328.
[155] Supra n. 47, Varmer, at pp. 291-294.
[156] Supra n. 47, Varmer, at p. 291. He also he also later writes how the '*Titanic* is of great interest to scientists, archaeologists, historians, naval architects, educators, salvors, the media, and the public.' (Supra n. 31, Varmer, at p. 15).
[157] Supra n. 47, Varmer, at pp. 296-297.
[158] Supra n. 9, Fletcher-Tomenius and Forrest, at pp. 6 and 9.
[159] Scrimo, J.T., (2000), 'Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks', 5(2) *Ocean and Coastal Law Journal* 271-308, at pp. 276-282; Cohan, J.A., (2004), 'An Examination of Archeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)', 27(2) *Environs Environmental Law and Policy Journal* 349-442.
[160] Supra n. 47, Bederman, at p. 354.
[161] Smith, H.D. and Couper, A.D., (2003), 'The Management of Underwater Cultural Heritage', 4(1) *Journal of Cultural Heritage* 25-33, at pp. 30 and 32.

UCH simply necessitates the integration of the oppositional practices of salvage and archaeology.[162]

More recently, however, it is possible to see an increasing recognition of UCH's multiple values beyond the dichotomy between archaeology and treasure hunting narratives. In 2009, Manders noted the need to differentiate the protection of different UCH sites pragmatically and based on their 'archaeological, historical and artistic or aesthetic value.'[163] In 2012, Maarleveld also wrote that recently 'there has been an understanding that decisions relating to heritage are based not just on one dimension of significance, but on a range of overlapping "values", ranging from sheer antiquity, through historic, artistic and remembrance values to utility values in the spheres of identity, ideology and otherwise.'[164] Similarly, in 2015, Secci and Spanu noted how '[l]egal, economic, social, cultural (stricto sensu), and psychological aspects all find their expression in strategies' for managing UCH.[165] In 2015, while discussing UCH management, Burgin notes how heritage is 'important to many groups for many reasons', including historic associations, spiritual and ancestral connections, safeguarding flora and fauna, or through opportunities for exploration.[166]

Furthermore, in 2015, Antony Firth published a report which highlighted the numerous benefits and beneficiaries of preserved maritime heritage in the United Kingdom, making 'the case for much greater attention to be directed at the social and economic benefits of' UCH.'[167] Such benefits 'are already occurring but they are obscured or unrecognised; and they have potential to be enhanced.'[168] This also accompanies the growing body of general research into some of the recreational and ecological value obtained by preserving

[162] Ibid, at pp. 31-32.
[163] Manders, M., (2009), 'In Situ Preservation: The "Preferred Option"', 60(4) *Museum International* 31-41, at p. 34.
[164] Maarleveld, T.J., (2012), 'The Maritime Paradox: Does International Heritage Exist?', 18(4) *International Journal of Heritage Studies* 418-431, at p. 419.
[165] Secci, M. and Spanu, P.G., (2015), 'Critique of Practical Archaeology: Underwater Cultural Heritage and Best Practices', 10(1) *Journal of Maritime Archaeology* 29-44, at p. 29.
[166] Burgin, L.R., (2015), 'Managing Michigan's Underwater Heritage: The Past, Present, and Future of Thunder Bay National Marine Sanctuary', *University of Michigan Working Papers in Museum Studies: Future Leaders*, Number 1 (2015) (at: http://ummsp.rackham.umich.edu/wp-content/uploads/2015/09/burgin-working-paper-fl-series-aug-7.pdf; accessed 1 May 2019), at p. 2.
[167] Firth, A., (2015), *The Social and Economic Benefits of Marine and Maritime Cultural Heritage: Towards Greater Accessibility and Effective Management*, Fjodr, Honor Frost Foundation (London), (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2015/09/HFF_Report_2015_web-4.pdf; accessed 18 November 2018), at p. 51.
[168] Ibid, at p. 51.

UCH in situ.[169] Then, in 2018, Firth also produced a further report relaying ten different sectors who have an 'interest' in the management of shipwrecks.[170] However, by focusing on 'interests' it cast equal consideration of the different *costs* of shipwrecks – such as being an obstacle to development or representing pollution – among the multisectoral interests, as well as maintaining a focus on practical utility, i.e., use.[171]

(b) A Multiple-Value Approach in Heritage Management Literature

Outside of the underwater context, in fact, an expanded understanding of cultural heritage's significance from a multiple-value perspective has been a growing discourse in heritage management over the past few decades. The starting point for many was in fact Riegl's seminal paper in 1903 on the valuation of art, which described a number of intangible qualities about cultural 'monuments' which must be calculated in order to derive their true value.[172] This included age, historical, intentional-commemorative, use, artistic, and newness values.[173] In 2014, for example, Lamprokos wrote how Riegl 'is often cited as the first, and most profound, formulation of values-based conservation.'[174] Although dated in terms of the methodology, such as by his exclusion of numerous social characteristics,[175] it is clear that Riegl's paper has been highly influential in establishing and legitimising the role of the state in heritage conservation. This then translated through into the 1931 Athens Charter for the Restoration of Historic Monuments and 1964 Venice Charter for the Conservation and Restoration of Monuments and Sites, which 'privileged historic, scientific and aesthetic values, as defined by various forms of expertise'.[176] However, it is the Burra Charter, drawn up in Australia in 1979, that forms the event which 'most authors agree . . . finally turned the attention of heritage experts towards

[169] E.g., Krumholz, J.S. and Brennan, M.L., (2015), 'Fishing for Common ground: Investigations of the Impact of Trawling on Ancient Shipwreck Sites Uncovers a Potential for Management Synergy', 61 *Marine Policy* 127-133; Supra n. 167, Firth, at pp. 35-37.
[170] Firth, A., (2018), *Managing Shipwrecks*, Fjordr, Honor Frost Foundation (London), (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2018/07/Managing-Shipwrecks-April-2018-web.pdf; accessed 18 November 2018).
[171] Ibid.
[172] Riegl, A., (1903), *Der Moderne Denkmalkultus: Sein Wesen Und Seine Entstehung*, W. Braumuller (Vienna), (Translation: Forster, K.W. and Ghirardo, D., (1982), 'The Modern Cult of Monuments: Its Character and Its Origins', 25 *Oppositions* 21-51).
[173] Ibid; Barassi, S., (2007), 'The Modern Cult of Replicas: A Rieglian Analysis of Values in Replication', *Tate Papers*, No. 8, Autumn 2007, (at: https://www.tate.org.uk/download/file/fid/7325; accessed 18 November 2018); Gibson, L. and Pendlebury, J., (2009), 'Introduction: Valuing Historic Environments', in *Valuing Historic Environments*, L. Gibson and J. Pendlebury (Eds.), 1-19, Routledge (Abingdon), at p. 7.
[174] Lamprokos, M., (2014), 'Riegl's "Modern Cult of Monuments" and The Problem of Value', 4(2) *Change Over Time* 418-435.
[175] Díaz-Andreu, M., (2017), 'Heritage Values and the Public', 4(1) *Journal of Community Archaeology & Heritage* 2-6, at p. 2.
[176] Jones, S., (2017), 'Wrestling with the Social Value of Heritage: Problems, Dilemmas and Opportunities', 4(1) *Journal of Community Archaeology & Heritage* 21-37, at p. 23.

social values and the *public*.'[177] This Charter, developed through ICOMOS, sought to take an inclusive approach to the categorisation and valuation of heritage, integrating the views of local, indigenous, and non-specialist communities.

Gibson and Pendlebury refer to this pluralistic conception of heritage as the 'cultural turn' which 'led to a questioning of what constitutes value [and] resulted in erosion of the previously dominant notion of value which understood it as . . . able to be revealed by . . . a limited body of experts.'[178] This more inclusive understanding of heritage values has therefore increasingly become a focal point for analysis in the past two decades. For example, in 2014-2015, the EU funded a Europe-wide study into the types of values attributed to cultural heritage and how these values are determined and ascribed. Various outputs from this project can be found, but one in particular is a special issue of the Journal of Community Archaeology & Heritage in 2017 entitled 'Heritage Values and the Public'.[179] Recent scholarship by archaeologists and heritage managers has thus led to the development of numerous interlinking and overlapping lists of the various 'categories' of heritage value. As Gibson and Pendlebury aptly defend such systems of value categorisation, 'whilst there is some acknowledgement of the reductionist problems they can cause, typologies lie perhaps even more than ever at the heart of the conservation process.'[180]

For example, the Burra Charter itself referred to cultural significance as including 'aesthetic, historic, scientific, social or spiritual value for past, present or future generations'.[181] The English Heritage *Conservation Principles*, originally published in 2008, and influenced by the Burra Charter,[182] ascribed heritage value based on its evidential, historical (associative and illustrative), aesthetic, commemorative, symbolic,

[177] Supra n. 175, Díaz-Andreu, at p. 2 (emphasis added); Ibid, Jones, at p. 23.
[178] Supra n. 173, Gibson and Pendlebury, at p. 1. As Olivier puts it, academic attention had previously been on 'scientific and evidential values that derive from specialist and expert knowledge. However, changing approaches to heritage management . . . shifted away from a reliance on expert and professional values to incorporate appreciation and consideration of wider and more inclusive values.' (Olivier, A., (2017), 'Communities of Interest: Challenging Approaches', 4(1) *Journal of Community Archaeology & Heritage* 7-20, at p. 8); Supra n. 176, Jones, at p. 21.
[179] This included Díaz-Andreu, Jones, and Olivier, supra nn. 175-176 and 178.
[180] Supra n. 173, Gibson and Pendlebury, at p. 7.
[181] *The Burra Charter, The Australia ICOMOS Charter for Places of Cultural Significance,* Australia ICOMOS Incorporated (Burwood), (last edition adopted October 2013, first adopted in August 1979), (at: https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf; accessed 18 November 2018), at para. 1(2).
[182] Supra n. 176, Jones, at p. 23.

social, and spiritual qualities.[183] In 1994, Kellert identified natural heritage, and specifically flora and fauna which carry an interesting parallel with the intangible qualities of cultural heritage, as possessing utilitarian, naturalistic, ecologistic-scientific, aesthetic, symbolic, humanistic, moralistic, dominionistic, and negativistic values.[184] In 2000, De La Torre and Avrami said how cultural heritage values have been put into 'categories such as aesthetic, religious, political, economic, and so on.'[185] In 2002, Mason refined the typology as including historical, cultural/symbolic, social, spiritual/religious, aesthetic, use, existence, option, and bequest values.[186] Further, in his highly influential and insightful chapter on the subject in 2009, Lipe suggests archaeological valuation includes questions of 'preservation, research, cultural heritage, education, aesthetics, and economics.'[187] Then, in 2017, Díaz-Andreu rightly notes how heritage values vary depending on the context and country in question, but many lists of values, 'including historical, aesthetic, economic, social, scientific and an array of other types'.[188]

Taking all this together and by simply turning these multiple-value understandings of heritage towards the underwater environment, it could be persuasively argued that UCH contains some or all of the following *values* (many of which invite pluralistic interpretations or can overlap or interlink):

- Historical value

UCH provides vital *historical* values by providing a physical and evidential link from the present to the past.[189] For archaeological sites, artefacts and historic properties 'have

[183] English Heritage, (2008), *Conservation Principles: Policies and Guidance for the Sustainable Management of the Historic Environment*, English Heritage (London), (at: https://content.historicengland.org.uk/images-books/publications/conservation-principles-sustainable-management-historic-environment/conservationprinciplespoliciesguidanceapr08web.pdf/; accessed 18 November 2018), at paras. 30-60.
[184] Kellert, S.R., (1994), *The Value of Life: Biological Diversity and Human Society*, Island Press (Washington).
[185] Avrami, E., Mason, R. and de la Torre, M. (Eds.), (2000), *Values and Heritage Conservation: Research Report*, Getty Conservation Institute (Los Angeles), (at: http://www.getty.edu/conservation/publications_resources/pdf_publications/pdf/valuesrpt.pdf; accessed 18 November 2018), at p. 8.
[186] Mason, R., (2002), 'Assessing Values in Conservation Planning: Methodological Issues and Choices', in *Assessing the Values of Cultural Heritage: Research Report*, M. de la Torre (Ed.), 5-31, Getty Conservation Institute (Los Angeles), at p. 5.
[187] Lipe, W.D., (2009), 'Archaeological Values and Resource Management, in *Archaeology and Cultural Resource Management: Visions for the Future*, L. Sebastian and W.D. Lipe (Eds.), 41-64, School for Advanced Research (Santa Fe), at p. 41. Lipe's list, which slightly differed at first, started in 1984 (see supra n. 19, Lipe).
[188] Supra n. 175, Díaz-Andreu, at p. 2.
[189] 'Historical values are at the root of the very notion of heritage.' (Supra n. 186, Mason, at p. 11); Supra n. 183, English Heritage Conservation Principles, at paras. 39-45; UNESCO, (1995), *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, General Conference, 28th Session, (4 October 1995, Paris), UN Doc. 28C/39, at para. 7.

great power to symbolize and represent the past, at least in part because they provide a physical, tangible link between past and present.'[190]

- Archaeological value

Similarly, the *archaeological* value relates to the society's enjoyment of UCH, whether participating as professional or amateur archaeologists, or benefitting from the fruits of the discipline's research.[191] Indeed, 'archaeological research has resulted in great increases in reliable knowledge about the human past and has continuously invigorated public interest in and understanding of that past.'[192]

- Educational value

There are many *educational* values of UCH, by providing an engaging medium through which society can engage in learning, envisioning, understanding and interpreting other lives and cultures.[193] As Lipe notes, the 'large number of books, magazine articles, television productions, lectures, classes, museum exhibits, and websites devoted to disseminating the findings of archaeological research testify to the broad public interest in this type of inquiry and its results.'[194]

- Social value

Social value is a broad category which relates to heritage's capacity to 'enable and facilitate social connections, networks, and other relations'.[195] In the UCH context, this could be manifested by the comingling of wreck divers, archaeologists, fishers, scientists, tourists, and the maritime community around submerged sites or in groups and networks. Although under-utilised, it would also include the capacity for the local community to strengthen their connections through shared local heritage. Furthermore, there is also the social value attained from engaging in preservation itself, whether derived from the feelings of compassion and being part of a community.[196] Social value also, of course,

[190] Supra n. 187, Lipe, at p. 53.
[191] Supra n. 183, English Heritage Conservation Principles, at paras. 35-38.
[192] Supra n. 187, Lipe, at p. 49.
[193] Supra n. 187, Lipe, at p. 58; Supra n. 186, Mason, at p. 11; Brown, E.D., (1996), 'Protection of the Underwater Cultural Heritage: Draft Principles and Guidelines for Implementation of Article 303 of the United Nations Convention on the Law of the Sea, 1982', 20(4) *Marine Policy* 325-336, at pp. 334-335; The UNESCO Convention's preamble refers to the 'educational . . . benefits' of UCH (supra n. 1, UNESCO Convention, Preamble).
[194] Supra n. 187, Lipe, at p. 49.
[195] Supra n. 186, Mason, at p. 12.
[196] Supra n. 187, Lipe, at p. 47; Supra n. 183, English Heritage Conservation Principles, at para. 30.

includes personal benefits obtained by protecting UCH sites, such as the value obtained by relatives and descendants of those on board a shipwreck.[197]

- Recreational value

There is also the more direct *recreational* value, whether that be from diving on sites and underwater museums and trails, viewing UCH through submersibles or glass bottom boats, or virtually or through digital media, as well as enjoying the sites or objects in a public museum.[198]

- Cultural value

There are also *cultural* or *identity* values, which provides people, communities and nations today with a connection to their ancestors.[199] Although this could include the preservation of local monuments and buildings, or the practice of cultural rites, rituals, commemorations, and celebrations, it is also just as possible to locate the very same cultural or identity values – such communal, national, ethnic, religious, or spiritual – in archaeological heritage underwater.[200] This therefore also ties in with the many spiritual and religious links to UCH, as well as the commemoration and veneration of UCH as burial sites and places of human suffering.

- Ecological value

Another value to also consider is the *ecological* value that UCH provides within its new submerged environment, by providing ecological benefits such as providing a reef or

[197] Supra n. 183, English Heritage Conservation Principles, at para. 30.
[198] Supra n. 183, English Heritage Conservation Principles at para. 32; Secretariat and the Scientific and Technical Advisory Body of the UNESCO 2001 Convention, (2013), *The Benefit of the Protection of Underwater Cultural Heritage for Sustainable Growth, Tourism and Urban Development*, UNESCO (Paris), (at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UCH_development_study_2013.pdf; accessed 18 November 2018); Supra n. 193, Brown, at p. 334; The UNESCO Convention's preamble refers to the 'recreational . . . benefits' of UCH (supra n. 1, UNESCO Convention, Preamble);
[199] Serageldin, I., (1999), 'Cultural Heritage as Public Good: Economic Analysis Applied to Historic Cities', in *Global Public Goods: Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 240-263, Oxford University Press (Oxford), at p. 240; Darvill, T., (1994), 'Value Systems and the Archaeological Resource', 1(1) *International Journal of Heritage Studies* 52-64, at p. 59; Francioni, F., (2012), 'Public and Private in the International Protection of Global Cultural Goods', 23(3) *European Journal of International Law* 719-730, at p. 720; Supra n. 186, Mason, at p. 11. See UNESCO Convention, Preamble, which refers to UCH as an 'important element in the history of peoples, nations, and their relations with each other concerning their common heritage'.
[200] Supra n. 186, Mason, at p. 12; Supra n. 183, English Heritage Conservation Principles, at paras. 54-60. As Brown once said, UCH 'contributes to the formation of identity and can be important to people's sense of community.' (Supra n. 193, Brown, at p. 334).

sanctuary for biodiversity and providing numerous ecosystem services as an integrated aspect of the biosphere.[201]

- Aesthetic value

There are also the *aesthetic* values that UCH can deliver, including the overall sensory experience,[202] where divers can enjoy real-life experience of a site and the non-diving community can enjoy imagery, photographs, telepresence and recreations of sites and objects. Preserving cultural heritage for its aesthetic and visual quality also provides the world with greater diversity and colour.[203] This also relates to appreciation of the organisation of physical elements, such as admiring architectural beauty or technical ingenuity.[204]

- Excitement value

More abstract is the intangible *excitement* value that the global community enjoys: they may never swim around and explore shipwrecks or sunken cities, but imagining the adventure of being a free-ranging Jacques Cousteau character continue to inspire and excite around the world, with countless books, films and television programmes engrossing viewers in adventures of underwater exploration. This includes the public's excitement about stories of shipwreck, disaster, piracy, war, natural disasters, and mythology, which can all be wrapped up in UCH,[205] as well as the mysticism of stories which are as yet, or may remain, untold. As Darvill says, the '*attraction* of places such as Stonehenge is probably that *relatively little is known* about their use and social context.'[206]

- Existence value

Some have written about the *existence* value of heritage, which provides 'feelings of well-being, contentment, and satisfaction', just by simply 'knowing it exists.'[207] Indeed, as Serageldin writes, 'even if they have never seen one and probably never will; if blue

[201] Supra n. 169; Matero, F.G, (2008), 'Heritage, Conservation, and Archaeology: An Introduction', *AIA site Preservation Programme*, Archaeological Institute of America (Boston), (at: https://www.archaeological.org/pdfs/Matero.pdf; accessed 18 November 2018), at pp. 4-5.
[202] Supra n. 186, Mason, at p. 12; Supra n. 183, English Heritage Conservation Principles, at paras. 46-53.
[203] Supra n. 187, Lipe, at pp. 56-57; Supra n. 186, Mason, at p. 11.
[204] Supra n. 183, English Heritage Conservation Principles, at para. 30; Supra n. 186, Mason, at p. 11.
[205] Supra n. 176, Jones, at pp. 24-25.
[206] Supra n. 199, Darvill, at p. 58 (emphasis added).
[207] Supra n. 199, Darvill, at p. 59; Samuels, K.L., (2008), 'Value and Significance in Archaeology', 15(1) *Archaeological Dialogues* 71-97, at p. 75; Supra n. 199, Serageldin, at p. 241; Supra n. 186, Mason, at p. 13.

whales became extinct, many people would feel a definite sense of loss.'[208] The very same could therefore be said for UCH sites around the world.

- Empathy value

A less-explored, but related value, is the *empathy* value inherent in the enjoyment that one receives by witnessing others attached to their own cultural heritage or in witnessing the heritage of others being compassionately protected.

- Intrinsic value

It is also inevitable that heritage, separate to socially constructed values, must possess some *intrinsic* value in isolation.[209] Moving beyond the anthropocentric account, and even the ecocentric, this could further anticipate the likely thoughts, feelings and interests of the inanimate objects themselves. For example, an archaeological site would theoretically prefer to remain integrally whole and in context.[210] Just as human remains would prefer, conceptually, to be treated humanely.[211] Although it is difficult to rebut the possibility that such values are still human-constructed and not necessarily "intrinsic", they still nevertheless appear to reside within the heritage itself.

- Economic value

The *economic* value of heritage includes both extractive and non-extractive values, such as the market value of the artefacts and materials at the site, as well as the capacity for commercialisation through tourism at a preserved site.[212] This also includes an *option* value which, in the case of UCH, would see the preservation of UCH as a gift to future generations to be able to enjoy the archaeological analysis to be carried out, particularly factoring in the better and less destructive archaeological technology which is available to future researchers or users.[213] Various economic models have been adopted over the years to attempt to quantify all these various tangible and intangible values (e.g., contingent valuation method), but none have proven satisfactory from an economic

[208] Supra n. 199, Serageldin, at p. 245.
[209] Supra n. 199, Serageldin, at p. 240; Supra n. 186, Mason, at p. 13.
[210] Alberts, H. C. and Hazen, H. D., (2010), 'Maintaining Authenticity and Integrity at Cultural World Heritage Sites', 100(1) *Geographical Review* 56-73; Ram, Y., Björk, P. and Weidenfeld, A., (2016), 'Authenticity and Place Attachment of Major Visitor Attractions', 52 *Tourism Management* 110-122.
[211] Wills, B., Ward, C. and Sáiz Gómez, V., (2014), 'Conservation of Human Remains from Archaeological Contexts', in *Regarding the Dead: Human Remains in the British Museum*, A. Fletcher, D. Antoine and JD Hill (Eds.), 49-74, British Museum (London); Roberts, C.A., (2009), *Human Remains in Archaeology: A Handbook*, Council for British Archaeology (York).
[212] Supra n. 187, Lipe, at p. 61; Supra n. 199, Serageldin, at p. 245.
[213] Supra n. 199, Darvill, at p. 57-58; Supra n. 199, Serageldin, at p. 245; Supra n. 186, Mason, at p. 13.

perspective.[214] This is perhaps unsurprising, given that most of heritage's values – as demonstrated in this section and explored further in Chapter 4 – are prototypically intangible, abstract, fluid, and therefore prone to positive externalities and, thus, adverse to economic quantifications.[215]

(c) A Multiple-Value Approach to Underwater Cultural Heritage Management

It is now possible to draw a clearer picture of the coveted yet under-explored 'multiple-value approach' to UCH management. Most significantly, such a model is not focused on finding common ground between the innately incongruent practices of salvage and archaeology, as was explored by a number of writers throughout the 1990s and 2000s,[216] but emphasises the need to more thoroughly consider the diversity of non-economic, abstract and intangible values which are continuously delivered to multifarious communities by protecting and preserving UCH. The result must be that the multiple-value model to UCH management necessitates the quantification and aggregation of all of these diverse and intangible values in future decision-making relating to sites.[217] In effect, therefore, the optimum treatment of UCH is that which produces the highest distribution of utility (values) to present and future generations, seeking the most Pareto-efficient outcome. As Lipe says, stakeholders must therefore 'recognize the multiple values at play, as well as the need for long-term protection and management of the archaeological properties in question. This may require mediating conflicting demands made by various populations of resource users.'[218] Similarly, as Labadi says, an approach which anticipates diverse social interests in heritage leads to the 'democratization of heritage discourses and conservation.'[219]

The multiple-value approach is therefore temporally and spatially expansive, such as by recognising that utility is delivered to both present and all future generations, as well as appreciating how values can often radiate to local or global community levels. It thus naturally includes consideration of future interests and future technologies, which will expand the opportunities for value distribution *efficiency*, such as better archaeological and recreational capacities, as well as the opportunity for value distribution *reach*, such

[214] See generally, Hutter, M. and Rizzo, I. (Eds.), (1997), *Economic Perspectives on Cultural Heritage*, Palgrave Macmillan (London).
[215] Ibid; Supra n. 186, Mason, at p. 13.
[216] Supra nn. 150-171.
[217] Supra n. 187, Lipe, at p. 63; Supra n. 183, English Heritage Conservation Principles, at para. 31.
[218] Supra n. 187, Lipe, at p. 46.
[219] Labadi, S., (2007), 'Representations of the Nation and Cultural Diversity in Discourses on World Heritage', 7(2) *Journal of Social Archaeology* 147-170, at p. 149.

as expanded capacity for value consumption beyond local or niche community scales. In contrast to the views of the opportunists, in Section 2, the multiple-level model fits well with the policy of in situ preservation of UCH as the 'preferred' option, except in cases where facts demand an alternative strategy (see above).[220] This is principally because UCH preserved in situ *continues* to produce and deliver diverse values;[221] whereas recovery may halt the production of many values and convert some of them into one-off tangible or private economic values.[222] In other words, recovery removes the opportunity for in situ archaeological analysis, recreational enjoyment, ecosystem services, or cultural and social value, for example. However, by contrast, when assessing whether a site has become suitable for recovery, a part of that calculation should include the value available to present and future generations from obtaining information from the site before it is lost or from accessing the UCH when conserved in an accessible museum. Indeed, it can produce many such global values when preserved or respected ex situ.

Thus, while opportunists might argue that ex situ cultural property still delivers comparable value, they neglect to recognise that all of this value remains preserved within the heritage when it is stabilised.[223] As Scott-Ireton once said, activities such as research, education and heritage tourism are 'appropriate ways to "use" shipwrecks [given that the] common factor for all of these uses is that none of them cause shipwrecks to be "used up".'[224] Indeed, even when in situ UCH is placed 'off-limits', such as by enforcing strict no-dive zones or shielding the site under sand or protective polypropylene mesh, most of these values are also frozen in storage for the enjoyment of future generations. In some ways, therefore, in situ UCH holds considerable 'option value' (as noted above), which enables future generations to determine the point at which the option to recover should be exercised. That decision, however, should acknowledge that raising and conserving UCH in a public repository might lead to the preserved and unremitting historical, archaeological, educational, recreational, social, cultural, aesthetic, empathy, existence, intrinsic, excitement, and even economic value from in situ preservation may be diminished or lost. As a result, activities directed at UCH which provide short-term value

[220] Supra n. 163, Manders.
[221] Supra n. 47, Varmer, at pp. 288 and 291.
[222] Supra n. 187, Lipe, at p. 42; Supra n. 166, at pp. 4-5.
[223] Supra n. 9, Fletcher-Tomenius and Forrest, at p. 3; c.f., Supra n. 25, Bryant, at p. 103.
[224] Gribble, J., Parham, D. and Scott-Ireton, D.A., (2009), 'Historic Wrecks: Risks or Resources?', 11(1) *Conservation and Management of Archaeological Sites* 16-28, at p. 19 (per Scott-Ireton).

for smaller 'elite' groups (such as profit-oriented salvors), but which neglect the collective and diverse values available for wider groups, should be prohibited or criminalised.[225]

As Manders writes, decisions to override the in situ principle should be 'a *matter of balancing* the costs, the effects of protective measures, and the importance of the site.'[226] According to this methodology, the multiple-use approach does not endorse in situ preservation over excavation as a matter of course, but instead requires the careful calculation of diverse uses from various groups, employing precautionary and ecosystem approaches, accounting for group size, internal distribution of utility, and future generations, as well as the relative costs of maintaining a site in situ, as compared with the cost of maintaining artefacts raised to the surface.[227] This also guides the design of archaeological projects. For example, project designs should ensure that the values inherent in UCH are preserved to their fullest extent and that any loss in value (including loss by proximate non-human life or loss to objects themselves) are compensated for as far as possible, such as by ensuring that the local community participates in the future management and interpretation of the artefacts, or by installing a new artificial reef, memorial or recreational dive site. Achieving this multiple-use model, which mediates the diverse interests and values of multiple stakeholders, informs many of the arguments raised in the remainder of this thesis.

4. The UNESCO Convention: Settling the Debate by Adopting a Multiple-Value Approach

Despite private interests in the preservation and exploitation of UCH forming the most active and impassioned debate in the academic literature surrounding the UNESCO Convention, in the final text the matter was dealt with swiftly and satisfactorily. The UNESCO Convention does finally, and in some rudimentary sense, address these multiple *values* of UCH as they pertain to the management of UCH from the competing perspectives of treasure salvage and archaeology. The Preamble specifically highlights the values represented by UCH when preserved in situ and ensuring the public's growing interest in its protection and right to enjoy the educational and recreational benefits

[225] Supra n. 187, Lipe, at p. 57.
[226] Supra n. 163, Manders, at p. 34 (emphasis added).
[227] Maarleveld, T.J., (2011), 'Open Letter to Dr. Sean Kingsley Wreck Watch International Regarding his Questionnaire on In Situ Preservation', 6(2) *Journal of Maritime Archaeology* 107-111; Supra n. 47, Varmer, at pp. 287-291; Supra n. 8, Nautical Archaeological Society, 35; Supra n. 133, Forrest, at p. 535.

thereof.[228] It also emphasises that threats facing UCH include 'legitimate activities that may indirectly affect it' (e.g., development, fishing, mining, construction), 'unauthorized activities' (e.g., pilfering, vandalism, IUU fishing, pollution), and expresses deep concern about its 'increasing commercial exploitation' (e.g., salvage, looting and trade in UCH artefacts).[229] These concerns were directly translated into an agreement under Article 2 to 'cooperate'[230] in the mission to 'preserve underwater cultural heritage for the benefit of humanity',[231] where the 'preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.'[232]

This therefore recognises the identified principle that in situ preservation may, when adjudged against competing uses, be the most sustainable approach for providing the optimum utility to the greatest number over the space of time. It also recognises that while preservation is the 'first option', it is not the only option, and any decision to excavate or dispose of UCH must be done in a manner that abides with the ethos of the Convention and is in the benefit of wider humanity, i.e., which provides for optimum value allocation.[233] Furthermore, should UCH be removed from its context, it needs to 'be deposited, conserved and managed in a manner that ensures its long-term preservation.'[234] Thus, rightly, the costs of long-term conservation – which can be significant and ongoing[235] – need to be factored in before any decision is taken to recover material: only when these costs are lower than those of preservation in situ, or the in situ value of the UCH is rapidly diminishing, should recovery become an option.[236]

A crucial aspect of the Convention in upholding the multiple-value approach is the agreement that underwater heritage 'shall not be commercially exploited.'[237] This forms an important cornerstone to the entire Convention. By seeking to eradicate any association of underwater cultural property with commercial profiteering, it is removed from a private-centred regime, founded upon commercial speculation, profit and personal

[228] Supra n. 1, UNESCO Convention, Preamble.
[229] Ibid.
[230] Supra n. 1, UNESCO Convention, Art. 2(2).
[231] Supra n. 1, UNESCO Convention, Art. 2(3).
[232] Supra n. 1, UNESCO Convention, Art. 2(5).
[233] Supra n. 14, Maarleveld, Guérin and Egger, at pp. 38-40.
[234] Supra n. 1, UNESCO Convention, Art. 2(6).
[235] Supra n. 21, Cho; Supra n. 14, Maarleveld, Guérin and Egger, at p. 200.
[236] Supra n. 14, Maarleveld, Guérin and Egger, at p. 28
[237] Supra n. 1, UNESCO Convention, Art. 2(7).

gain,[238] and transformed into a public good, premised upon sharing, public access and distribution of diverse values to wider society. Any activity directed at UCH which appears commercially motivated in terms of private gain at the expense of public value, therefore, should be antithetical to the purpose of the Convention. Importantly, this does not mean that activities utilising UCH cannot be commercial in toto, but that they cannot be *both* 'commercial' and 'exploitative'.[239]

For example, Article 4 permits of certain publicly-supervised salvage operations and the Rules permit, under Rule 2, payment for professional archaeological services[240] and for the deposition of UCH property to a public institution such as a museum, 'provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal.'[241] In many other ways, the Rules also emphasise the need to preserve UCH and maximise its benefits for the greater good and for future generations, including the re-emphasis of preservation as the first option,[242] promotion of non-destructive analysis on sites,[243] minimising unnecessary disturbance or deterioration of preserved sites,[244] proper recording of activities,[245] and promoting sustainable public access to sites.[246] Therefore, commercial activities directed at UCH which have a public-oriented focus and which bring sustainable investment into a community, such as underwater museums and other ecotourism activities, are to be encouraged.[247]

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[238] UCH is 'threatened by activities that are wholly undesirable because they are intended to profit few at the expense of many' (ICOMOS, (1996), *Charter on the Protection and Management of Underwater Cultural Heritage*, 11th ICOMOS General Assembly, October 1996 (Sofia), (at: https://www.icomos.org/charters/underwater_e.pdf; accessed 18 November 2018), at Introduction).

[239] Supra n. 81, Gongaware, at pp. 207-208; Supra n. 78, O'Keefe, at pp. 124-125; C.f., Stemm and Bederman have argued that 'exploitation' should be interpreted in the context of Article 18 (on the unrelated matter of seizure) and should only mean where UCH's disposal is not for the public benefit such as sold to a museum (Stemm, G. and Bederman, D.J., (2011), 'Virtual Collectors and Private Curators: A Model for the Museum of the Future', in *Oceans Odyssey 2: Underwater Cultural Heritage Management and Deep-Sea Shipwrecks in the English Channel & Atlantic Ocean*, G. Stemm and S. Kingsley (Eds.), 27-38, Oxbow Books (Oxford), at p. 32).

[240] Supra n. 85, UNESCO Rules, Rule 2(a).

[241] Supra n. 85, UNESCO Rules, Rule 2(b).

[242] Supra n. 85, UNESCO Rules, Rule 1.

[243] Supra n. 85, UNESCO Rules, Rule 4.

[244] Supra n. 85, UNESCO Rules, Rules 3 and 5.

[245] Supra n. 85, UNESCO Rules, Rules 6 and 27.

[246] Supra n. 1, UNESCO Convention, Art. 2(10); Supra n. 85, UNESCO Rules, Rule 7.

[247][247] Supra n. 149, Carducci, at p. 424; Prott, L.V., (2006), 'The Need for Ratification: Urgency and Uniformity', in *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage*, L.V. Prott (Ed.), Institute of Art & Law (Builth Wells), at pp. 142-143; A commercially exploited site is one 'in which the primary motive for is one for private financial gain' (ICMM, (1993), *Underwater Archaeology Resolutions*, (adopted 10 September 1993, Barcelona), International Congress of Maritime Museums (Greenwich), (at: https://archive.asia.si.edu/exhibitions/SW-CulturalHeritage/downloads/ICMMArchaeologyPolicy.pdf; accessed 18 November 2018)).

Another vital part of the UNESCO Convention, promoting the sustainable protection of UCH's multiple values, is provided under Article 4, which permits salvage only to the extent that is authorised by a competent authority, is in full conformity with the Convention, and ensures that recovery achieves the maximum protection of the UCH in question.[248] It is unsurprising that this article is one that has since invited considerable debate and critique. However, the article is simple and attractive. It is permitting of some form of salvage, but only under very stringent conditions. It certainly makes salvage harder, but it does not remove its relevance altogether.[249] The Convention could be seen to permit salvage law provided the law itself is revised to be entirely unlike the US model based on private profit-seeking, premature recovery, and short-termism.[250]

Not all agree on this, with some commentators questioning whether the strictly worded exceptions under Article 4 will deny salvage so much as to make it irrelevant.[251] However, because the drafters did not draft a complete prohibition, the opposing argument is more convincing: that salvage is permitted, but only under exceptional non-exploitative circumstances.[252] It encourages a complete rehaul of salvage law away from archaeology, making it necessarily built upon carefully drafted permits which require prior investigation of potentially affected users and which recognise the global values delivered by in situ preservation. It also ensures that any *necessary* recoveries are conducted under strict compliance with the UNESCO Convention and Rules, i.e., operated under the firm guidance of the archaeological and scientific community and not conducted for private gain.[253] It could further allow salvors-in-possession or finders a

[248] Supra n. 1, UNESCO Convention, Art. 4.
[249] The Convention 'severely curtails – but does not totally exclude – the application of salvage law and the related law of finds.' (Supra n. 51, Dromgoole, at p. 61).
[250] Supra n. 78, O'Keefe, at p. 50; O'Keefe, P.J., (2002), 'Fourth Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage', 11(1) *International Journal of Cultural Property* 168-172, at pp. 171-172; Supra n. 81, Gongaware, at pp. 207-213; c.f., Supra n. 30, Segarra, at p. 387.
[251] Supra n. 3, Dromgoole, at p. 340; Supra n. 80, Coleman, at pp. 858-859.
[252] Forrest that Article 4 leaves the courts with significant freedom to continue applying salvage law (Supra n. 70, Forrest, at pp. 342-343); Blumberg, R.C., (2005), 'International Protection of Underwater Cultural Heritage', in *Recent Developments in the Law of the Sea and China*, M.H. Nordquist, J.N. Moore and K. Fu (Eds.), 491-512, Brill (Leiden).
[253] Supra n. 78, O'Keefe, at p. 50; Supra n. 149, Carducci, at p. 425; Supra n. 153, Nafziger, at p. 328; 'The commercialization of archaeological objects [is seeing them] as commodities to be exploited for personal enjoyment or profit … Archaeologists should therefore carefully weigh the benefits to scholarship of a project against the costs of potentially enhancing the commercial value of archaeological objects. Whenever possible they should discourage, and should themselves avoid, activities that enhance the commercial value of archaeological objects, especially objects that are not curated in public institutions, or readily available for scientific study, public interpretation, and display.' (Society for American Archaeology, (1996),

new "reward", such as co-management of sustainable ecotourism activities which are non-destructive and largely in the public benefit.[254] Article 4 is therefore to be praised as a sound compromise between the two polarities of salvage and archaeology. It fairly achieves the Convention's overall aim of removing UCH from activities for private gain, while still respecting the tradition in common law states for regulating UCH protection through historic salvage laws.[255]

5. Conclusion: Moving Beyond Treasure Hunting in International Underwater Cultural Heritage Policy

The overriding objective of the UNESCO Convention was to end the debate between archaeologists and treasure salvors, while instituting a common approach to managing submerged cultural property according to archaeological and conservational principles.[256] As Williams said of the UNESCO Convention, 'they were out to deal with treasure salvors and that's all they were out to deal with.'[257] Similarly, as González once put it, the 'central objective of the Convention is to prevent looting of underwater cultural heritage.'[258] As Firth summarised in interview, the 'Convention is mainly about treasure hunting, but that has been one of the major issues. So, if it were to be put in place and to really literally give no harbour to treasure hunters, then that would be a major step forward.'[259] In terms of this objective, as this chapter has shown, the Convention deserves considerable praise. There seems little doubt that it has greatly assisted a culture change in public perceptions and attitudes to UCH: whereas in the 1980s and 1990s, and particularly in common law traditions, UCH was widely viewed as a source of treasure, providing its finder with quixotic riches; it now seems more readily accepted that submerged archaeological resources, across the globe, need to be treated as a threatened and important publicly held asset. In addition to the numerous benefits identified in

Principles of Archaeological Ethics, (adopted by the Executive Board, 10 April 1996 (Washington)), Principle 3).

[254] Supra n. 250, O'Keefe, at p. 172; Supra n. 153, Nafziger, at pp. 317 and 324-325; Aznar, M.J. and Varmer, O., (2013), 'The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection', 44(1) *Ocean Development & International Law* 96-112, at pp. 98-101; The Singapore High Court once refused to give out a salvage award when the salvors had not been acting in the interests of the public or the title holders, but were only interested in making a profit (*Simon v. Taylor* (1975) 1 MU 236 (Singapore), at para. 240).

[255] Supra n. 56, Scovazzi, at p. 289.

[256] Supra n. 51, Dromgoole, at p. 345; Supra n. 129, Dromgoole, at p. 63.

[257] Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.

[258] González, A.W., O'Keefe, P.J. and Williams, M., (2009), 'The UNESCO Convention on the Protection of the Underwater Cultural Heritage: A Future for our Past?', 11(1) *Conservation and Management of Archaeological Sites* 54-69, at p. 56 (per González).

[259] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File.

Chapter 1,[260] therefore, ratification of the Convention is likely to continue this move towards multiple-value and public-oriented management approaches.

However, it is also clear that the UNESCO negotiations focused too much energy on the specific challenges wrapped up in this objective, such as revising the law of salvage for historic objects, addressing trade in underwater cultural property, and raising the standards of marine archaeology. As a result, the negotiations did not have an opportunity to address many other increasingly critical and destructive threats to UCH of an incidental, indirect or illicit nature, such as the threats of trawling, fishing, development, pollution, mining, dredging, energy production and climate change. Perhaps the biggest threat of all, outside the traditional concern for legalised treasure hunting, is the ever-growing reports of illegal or unreported looting and pilfering. Stories are emerging from all corners of the world which show how a new breed of opportunists have dispensed with law altogether and are continuing to loot metals, materials and artefacts from UCH sites covertly and without legal sanction.[261]

As a result, it seems increasingly recognised that it is these growing indirect, illegal and incidental threats which have very recently been promoted to the most urgent and critical concern. Indeed, as Dromgoole said in 2006, 'the biggest challenge for the future is likely to be dealing with inadvertent damage or destruction to the UCH from human activities.'[262] She adds later that 'the threat of incidental damage to the UCH as a result of human activities around the shores . . . is substantial.'[263] Kingsley has even proposed

[260] See Chapter 1, Section 4.
[261] E.g., BBC News, (2018), 'UK Investigates WW2 Shipwreck Looting Claims', 19 August 2018, *BBC News*, (at: https://www.bbc.co.uk/news/uk-45238158; accessed 1 December 2018); Lamb, K., (2018), 'Lost Bones, A Mass Grave and War Wrecks Plundered off Indonesia', 28 February 2018, *The Guardian*, (at: https://www.theguardian.com/world/2018/feb/28/bones-mass-grave-british-war-wrecks-java-indonesia; accessed 1 December 2018); Brean, J., (2017), ''It's Grave Robbing': Treasure Hunters Suspected to have Looted Infamous 1915 Shipwreck', 5 December 2017, *National Post*, (at: https://nationalpost.com/news/canada/its-grave-robbing-treasure-hunters-suspected-to-have-looted-infamous-1915-shipwreck; accessed 1 December 2018); Holes, O., (2017), 'Sunken Australian Warship HMAS Perth Ransacked by Illegal Scavengers', 5 June 2017, *The Guardian*, (at: https://www.theguardian.com/australia-news/2017/jun/05/sunken-australian-warship-hmas-perth-ransacked-by-illegal-scavengers; accessed 1 December 2018); Middleton, J. and Neal, C., (2018), 'Shipwreck Looters who Plundered Historical Artefacts from Royal Navy Warship at Bottom of the Sea Jailed', 22 June 2018, *The Mirror*, (at: https://www.mirror.co.uk/news/uk-news/shipwreck-looters-who-plundered-historical-12771186; accessed 1 December 2018); Mema, B., (2018), 'Looters Plunder Albania's Sunken Treasures', 18 November 2018, *Phys.Org*, (at: https://phys.org/news/2018-11-looters-plunder-albania-sunken-treasures.html; accessed 1 December 2018).
[262] Supra n. 3.
[263] Supra n. 3, Dromgoole, at p. 346.

that fishing presents the greatest threat of all.[264] As Coroneos also said in 2006, '[h]istorically, the impact of seabed development has often been relegated to a position of low priority on the list of threats to [UCH]. However, threats to underwater cultural heritage via seabed development are increasing due to the rapid increase of urbanisation and expansion of coastal development into such remote areas.'[265] Similarly, in 2012, Flatman listed growing threats to UCH, including fishing, hydrocarbon extraction, mining, dredging, marine engineering, storage of CO^2 or effluent under the seabed, ocean fertilisation, and renewable energy production.[266]

As Aznar stressed in 2016, 'despite the importance of recent treasure hunting activities in EU waters, the most severe dangers come from licit, legitimate human activities in coastal waters including fishing, mining, coastal planning'.[267] In interview, Manders also relays that 'the big problem with the UNESCO Convention is that . . . it was basically made to keep commercial salvagers out of the game, but that's not the biggest issue.'[268] He continues, 'the biggest issue is trawling, the biggest issue is ignorance . . . the biggest issue is infrastructural buildings, wind farms on the North Sea, those kinds of things, climate change and the effect it has on the seabed. Those are the biggest problems'.[269] Such threats are a completely different challenge and require a very different set regulatory responses which were not addressed effectively by the Convention. As Flatman said in 2012, '[f]ar less well understood [and] under-studied, are the "indirect" threats posed by energy developments to submerged and coastal archaeological sites.'[270] Saying earlier in 2009, that these 'unprecedented threats [are] arguably, greater than that

[264] Kingsley, S.A., (2015), *Fishing and Shipwreck Heritage: Marine Archaeology's Greatest Threat?*, Bloomsbury Academic (London), at pp. 45-59.
[265] Coroneos, C., (2006), 'The Four Commandments: The Response of Hong Kong SAR to the Impact of Seabed Development on Underwater Cultural Heritage', in *Heritage at Risk Special Edition, Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts*, R. Grenier, D. Nutley and I. Cochran (Eds.), 46-48, ICOMOS (Paris), at p. 46.
[266] Flatman, J., (2012), 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy', in *Archaeology in Society: Its Relevance in the Modern World*, M. Rockman and J. Flatman (Eds.), 167-192, Springer (New York), at pp. 172-173.
[267] Supra n. 2, Aznar, at p. 4; Bautista, L., (2013), 'Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law', in *Securing the Ocean for the Next Generation: Papers from a Law of the Sea Institute*, UC Berkeley-Korea Institute of Ocean Science and Technology Conference (May 2012, Seoul), H. Scheiber and M. Kwon (Eds.), Berkeley Law (Berkeley), (at: https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2491&context=lhapapers; accessed 18 November 2018), at p. 25.
[268] Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File.
[269] Ibid.
[270] Supra n. 266, Flatman, at p. 174.

presented by the treasure-hunting community.'[271] As such, they require 'new and often novel approaches to their conservation and management.'[272]

Unfortunately, the only part of the Convention to address these critical threats was a mere hortatory article committing each state to '*use the best practicable means at its disposal to prevent or mitigate* any adverse effects that might arise from activities under its jurisdiction incidentally affecting' UCH.[273] Forrest once said that this provision 'provides too weak an obligation on states'.[274] Similarly, Varmer underscores the provision as merely a 'soft legal obligation'.[275] It was originally not even clear what normative duty results from it or whether it would place too great a burden on states with waters rich in UCH, as was a principal objection of the UK to the final text.[276] O'Keefe has effectively addressed this concern, saying that the 'best practicable means', referred to in both Articles 2(4) and 5, 'means that states are not bound to pursue the most extreme means of preventing or mitigating adverse effects. "Practicable means" would be those most appropriate taking into account the physical situation, the science involved and the cost of taking action.'[277]

O'Keefe defends the general weakness of Article 5, by saying that 'politically it was probably as much as could be gained in the context', which at first seems reasonable enough.[278] However, given the critical threat posed by such indirect activities to a delicate and non-renewable resource, greater reflection should have perhaps been made on more ambitious state obligations in this regard. For example, the UNESCO 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works[279] could have been incorporated or adapted in various parts to bolster the Convention. This is why, in interview, Aznar expressed that his 'great

[271] Flatman, J., (2009), 'Conserving Marine Cultural Heritage: Threats, Risks and Future Priorities', 11(1) *Conservation and Management of Archaeological Sites* 5-8, at p. 7.
[272] Ibid, at p. 5.
[273] Supra n. 1, UNESCO Convention, Art. 5 (emphasis added).
[274] Supra n. 70, Forrest, at p. 339.
[275] Varmer, O., (2014), 'Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf', 33(2) *Stanford Environmental Law Journal* 251-286, at p. 263.
[276] Foreign and Commonwealth Office, (2001), *Explanation of Vote to UNESCO on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 31 October 2001 (can be accessed in supra n. 135, UK UNESCO Convention Review Group, at pp. 87-88); Supra n. 135, UK UNESCO Convention Review Group, at p. 59.
[277] Supra n. 78, O'Keefe, at p. 51.
[278] Ibid; Supra n. 135, UK UNESCO Convention Review Group, at pp. 59-68.
[279] UNESCO, (1968), *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, adopted at the 41st Plenary Meeting, 19 November 1968, UNESCO (Paris).

concern' with the UNESCO Convention 'is with the low attention given to Article 5 and what it represents'.[280] Similarly, Maarleveld urged that:

> 'the weak spot is that it only addresses activities that are directed at the underwater cultural heritage. It does not really go for an overall approach. The overall approach that you are writing about now.'[281]

As this chapter has demonstrated, there remains considerable concern with how states should now address the mounting indirect, incidental and illegal threats to UCH, beyond the traditional threat of treasure hunting. The weaknesses of the UNESCO Convention in addressing these critical threats is the subject of the next three chapters: where Chapter 3 focuses on the normative substance of the 'duty to cooperate', which undergirds the entire UNESCO Convention; Chapter 4 addresses the poor levels of state compliance with the UNESCO Convention and, particularly, its provisions on dealing with incidental threats to UCH; and Chapter 5 analyses the underlying weaknesses of relying solely on a the international legal system to address such poor compliance.

[280] Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File.
[281] Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.

Chapter 3
International Cooperation and the UNESCO Convention

Chapter Abstract:

This chapter is the first to critically examine the UNESCO Convention, qua inter-state treaty, as a means to address the protection of underwater cultural heritage (UCH). It introduces the traditional political contests which have taken place between states, especially between flag and coastal states, in the allocation of rights and responsibilities across ocean space. It then examines how the UNESCO Convention sought to resolve this contestation between sovereign interests by simply requiring that states "cooperate" ad hoc. Therefore, it provides a thorough examination of the normative quality of a 'duty to cooperate' under international law, finding that this duty carries very little meaningful obligation and obliges states to engage in "passive" forms of cooperation, when "active" forms of cooperation are what is needed. It demonstrates this by showing examples of 'regime thickening' in the protection of fisheries and marine living resources, wherein the urgency of protection has led to an ongoing process of coagulating and expanding multilateral, supranational and transnational obligations. It then paves the way for Chapter 4 to examine the extent to which states will be proactive in protecting UCH or in developing more detailed regimes towards its protection.

1. Challenges with the Allocation of Flag, Coastal and Port State Jurisdiction over Underwater Cultural Heritage Management

(a) Issues with International Cooperation and the UNESCO Convention

The ocean is a global theatre for geopolitics. Any reading on the formation of the law of the sea over the past few centuries provides a historiographical account of national power, belligerent territoriality and militaristic posturing. It is in this politically-charged domain that the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention) sought to make headway and reconcile the competing interests and countervailing forces within the ocean's political drama; which has typically been between *flag* state jurisdiction and *coastal* state jurisdiction.[1] In the context of the UNESCO Convention, the conflict between the concept of the Freedom of the Seas, extolled by dominant maritime states, and with the concept of a 'Cultural Protection

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.

Zone' contingent with the Exclusive Economic Zone (EEZ), as promoted by coastal states, led to deadlock within the UNESCO Convention negotiations.

In the end, the interests of the traditionally dominant maritime states were given priority and the present 'balance' of state rights and responsibilities found under the United Nations 1982 Convention on the Law of the Sea (LOSC) were respected. As this chapter demonstrates, considering this difficult contest between coastal and flag state interests, the Convention did a reasonably commendable job of achieving a widely respected and increasingly ratified treaty. Unfortunately, however, the political tensity of the subject meant that a large number of constructive ambiguities and normative gaps were left in the international law, which were resolved by merely relying on an agreement between states to 'cooperate' when their interests in UCH intersect. In other words, the resulting treaty struggled to go much further than the existing system of cooperation under the LOSC.[2]

As a corollary, the UNESCO Convention was intended to provide a 'detailed and practical'[3] international cooperation system which would set the ground rules for such future cooperation between the numerous conflicting states relating to the protection and management of UCH, utilising the appointment of 'coordinating states'. While there are arguments that the system is perhaps unnecessarily complex or may add little beyond the existing international law,[4] the biggest concern identified in this chapter appears to be with the concept of a *duty of cooperation* itself. The argument is that the present system of cooperation envisaged by the UNESCO Convention is developed for a "passive" system of cooperation, wherein states only negotiate their respective interests when those interests *have come into actual conflict* and therefore, by standard, after-the-event. However, most of the urgent and imminent threats facing UCH – such as looting, fishing, dredging, shipping, cable-laying, and construction, and so on – demand "active" modes of cooperation, wherein states engage in ongoing processes of multilateral and supranational regime-building to capture defection and free riding and defection before-the-event.

[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.
[3] UNESCO, 'Underwater Cultural Heritage: The State Cooperation System', (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/state-cooperation-system/; accessed 15 December 2018).
[4] Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.

The importance of cooperation and its meaning has been noted by UCH scholars previously. For example, Dromgoole once referred to cooperation as the 'fundamental principle' of the UNESCO Convention.[5] Similarly, in 2013 Risvas published an article which looked directly at the challenges of cooperation and the UNESCO Convention and, like the analysis that follows, also called into question the normative content of a duty to cooperate within international law.[6] Nevertheless, his brief article only touches upon the issues addressed in this chapter, such as noting the normative uncertainty of the duty of cooperation, without going into depth on the challenges or underlying causes. Nevertheless, his brief concluding proposals – that states should negotiate a new treaty or new regional and bilateral treaties – accords with many of the arguments made in Chapter 7, which calls for more detailed regime-building at the regional level. Referring to examples from the protection of fishing and marine living resources, this chapter eventually proceeds by arguing that effective governance of UCH protection will require more 'active' forms of cooperation, usually epitomised by the continuous building of more detailed and integrated multi-level normative regimes, rather than a merely 'passive' form of cooperation, traditionally built on bilateral conflict resolution.

(b) Competing Flag and Coastal State Interests within the UN Convention on the Law of the Sea

The political tug-of-war between states – to determine sovereign rights and freedoms over ocean space and allocated across maritime zones – is predominantly built upon the economic ambitions of sovereign states and often played out through diplomacy, political posturing and displays of military power.[7] As Cheever once said, '[n]owhere is the indissoluble relationship between politics and law demonstrated more cogently than in the law of the sea.'[8] In this domain, as is well-known, the law of the sea has played out as an intractable debate between the competing binary concepts of flag state jurisdiction and non-flag state jurisdiction, usually simplified down to an argument between the

[5] Dromgoole, S., (2006), 'United Kingdom', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 344.
[6] Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590.
[7] E.g., Kraska, J., (2011), *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford University Press (Oxford); Mahan, A.T., (1890), *The Influence of Sea Power upon History*, Little, Brown and Company (Columbus); O'Connell, D.P., (1975), *The Influence of Law on Sea Power*, Manchester University Press (Manchester).
[8] Cheever, D.S., (1984), 'The Politics of the UN Convention on the Law of the Sea', 37(2) *Journal of International Affairs* 247-252, at p. 247.

competing concepts of the Mare Liberum ("Open Sea") and Mare Clausum ("Closed Sea").[9]

The former, which has been the dominant ideology throughout the development of the law of the sea, has espoused the view that the ocean is free and limitless and, as such, should not be subject to territorial dominion. This concept – necessitating the regulation of ocean space by flag state jurisdiction – is based loosely on Grotius's 1609 legal brief opposing Portuguese territorialisation of the high seas and has ever since been devotedly retold as an argument in favour of preserving the 'Freedom of the Seas'.[10] The resulting system – which provides for an open ocean which is effectively lawless, but where it is the vessels operating which are themselves regulated by their distant flag states – has provided a liberal system of regulation which has uncoincidentally benefited the dominant maritime and colonialist powers of the past few centuries. By contrast, the Mare Clausum, also loosely based on a book of the same name by John Selden in 1635,[11] provides the counter-view that the ocean is capable of territorial encroachment by coastal states and that such states should be able to control activities in the areas proximate to their coastlines or, today, that such states should be entitled to exploit living and non-living resources in the area found hundreds of miles off their shoreline.

This debate between the two competing systems of governance is often couched in the language of a normative debate over the more suitable, effective and customary system for managing the seas. Indeed, this was the case within the UNESCO Convention itself, where negotiations grappled with the flawed ability of distant coastal states or economically-oriented port states to regulate UCH in their territorial seas, EEZ or continental shelf; against the similarly flawed ability of distant flag states to regulate activities taking place in other state's maritime zones.[12] However, a further look at the

[9] E.g., Vieira, M.B., (2003), 'Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas', 64(3) *Journal of the History of Ideas* 361-377; Papastavridis, E., (2011), 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited', 24(1) *Leiden Journal of International Law* 45-69; Russ, G.R. and Zeller, D.C., (2003), 'From Mare Liberum to Mare Reservarum', 27(1) *Marine Policy* 75-78; Anand, R.P., (1983), *Origin and Development of the Law of the Sea: History of International Law*, Brill (Leiden), at pp. 105-111.

[10] Grotius, H., (1609), *Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia dissertatio*, Ludovici Elzevirij (Leiden); Jacques, P., (2009), 'The Power and Death of the Sea', in *Environmental Governance: Power and Knowledge in a Local-Global World*, G. Kütting and R. Lipschutz (Eds.), 60-78, Routledge (Abingdon), at p. 67.

[11] Selden, J., (1635), *Mare Clausum, seu de Dominio Libri Duo*, Juxta Exemplar Will (London).

[12] Blumberg, R.C., (2005), 'International Protection of Underwater Cultural Heritage', in *Recent Developments in the Law of the Sea and China*, M.H. Nordquist, J.N. Moore and K. Fu (Eds.), 491-512, Brill (Leiden). See infra subsection (c) and Chapter 5, Section 3(d).

motives underlying the contest makes clear that the debate is not about which is more *effective*, but about which ultimately delivers the propounding state the greatest amount of resources and power. Indeed, the growing tension between the United States with China in the South China Sea appears more like a defence of the right of states to navigate trade, conduct military operations and prevent coastal exploitation of a resource-rich region, rather than any justified defence of the quality of flag state regulation as the most effective system of marine governance.[13] The same can be seen in reverse, where arguments promoting the rightful placement of coastal state "jurisdiction" are really a masked argument in favour of coastal state power and ownership of distant resources, regardless of the environmental protection challenges this entails.[14]

As is argued in Chapters 4 and 5, the resulting law of the sea has largely been crafted by hegemony, wherein economic might and military power have been the dominant force driving the development of the law. As such, the ocean has maintained a laissez-faire system of regulation benefitting the powerful flag states of the era. However, this historic entrenchment of the Freedom of the Seas underwent a seismic rupture in the post-WWII period, after the Truman Proclamations of 1945.[15] Despite the United States being the principal benefactor of the incumbent liberal system of ocean regulation, the economic interests of states with large coastlines dramatically altered following the development of offshore mining capabilities, causing the US to trigger the coastal state 'expansionist movement'.[16] Suddenly many powerful states, often benefiting from extensive continental shelves, including once-imperial powers with coastlines ranging off distant postcolonial islands and territories, had the resources and technology to properly exploit

[13] Zhang, F., (2017), 'Assessing China's Response to the South China Sea Arbitration Ruling', 71(4) *Australian Journal of International Affairs* 440-459; Roy, D., (1994), 'Hegemon on the Horizon? China's Threat to East Asian Security', 19(1) *International Security* 149-168, at pp. 163-164; Zhang, H., (2010), 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ', 9(1) *Chinese Journal of International Law* 31-47.

[14] See infra Chapter 5, Section 3(d).

[15] Truman, H.S., (1945), *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, US Presidential Proclamation No. 2667, (at: https://www.trumanlibrary.org/proclamations/index.php?pid=252&st=&st1; accessed 15 October 2018); Truman, H.S., (1945), *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*, US Presidential Proclamation No. 2668, (at: https://www.trumanlibrary.org/proclamations/index.php?pid=253&st=&st1=; accessed 15 December 2018); Watt, D.C., (1979), 'First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945', 3(3) *Marine Policy* 211-224; Oxman, B.H., (2006), 'The Territorial Temptation: A Siren Song at Sea', 100(4) *American Journal of International Law* 830-851, at p. 832.

[16] Galdorisi, G. and Stavridis, J., (1993), 'Time to Revisit the Law of the Sea?', 24(3) *Ocean Development and International Law* 301-315, at p. 302; Jacobson, J.L., (1982), 'Sea Changes', 91(4) *Yale Law Journal* 842-855, at p. 845.

resources beyond the narrow belt of the territorial sea.[17] The following decades witnessed a race, as all states moved to proclaim their own extended coastal interests or to emulate the claims of others, in a dramatic turn towards coastal state expansionism, or the 'Mare Clausum'.[18]

The UNCLOS III treaty negotiations, starting in 1973 and signed in 1982, represented a momentous international effort to place a ceiling on this mounting seaward encirclement by coastal states.[19] The territorial sea – giving absolute territorial sovereignty comparable to those on land subject to the right of innocent passage[20] – had expanded everywhere beyond the historic 'cannon shot rule' limit up to varying distances, but the LOSC firmly settled upon a fixed 12-nautical mile maximum limit.[21] The LOSC also famously declared the deep seabed beyond national jurisdiction (the Area) and the mineral resources therein as belonging to the international community and designated them as the 'Common Heritage of Mankind'.[22] Furthermore, in order to manage coastal claims to living resources, the LOSC led to an entirely new legal zone – the EEZ – extending up to 200-nautical miles from baselines.[23] Similarly, to deal with claims over the minerals and hydrocarbons upon continental shelves, many legal rules were developed to provide such rights over the continental shelf up to 200-nautical miles and beyond up to a maximum limit as defined in Article 76(5) and (6) of the LOSC.[24] Within these zones, states claimed a host of other important entitlements such as freedom to conduct scientific experiments and enforce environmental laws.[25] Importantly, such zones are not coastal state territory,

[17] Given the ability of previous colonial powers to include overseas territories, including small Pacific and Indian Ocean islands, as comprising state territory, the following are among the world's 10 largest states in terms of total EEZ size (up to 200-nautical miles offshore): United States, Russia, United Kingdom, France, Australia, Canada, Japan, New Zealand.
[18] Oda, S., (2003), *Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice*, Kluwer Law International (Alphen), at pp. 19-23.
[19] Supra n. 16, Galdorisi & Stavridis, at p. 302.
[20] E.g., Nasu, H., (2018), 'The Regime of Innocent Passage in Disputed Waters', 94 *International Law Studies* 241-283; Ghosh, S., (2017), 'The Legal Regime of Innocent Passage Through the Territorial Sea', in *Law of the Sea*, H. Caminos (Ed.), 37-64, Routledge (Abingdon); Hakapää, K. and Molenaar, E.J., (1999), 'Innocent Passage – Past and Present', 23(2) *Marine Policy* 131-145.
[21] Supra n. 2, LOSC, Arts. 3 and 4; Kaye, S., (2009), 'State Practice and Maritime Claims: Assessing the Normative Impact of the Law of the Sea Convention', in *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston*, A. Chircop, T. McDorman and S. Rolston (Eds.), 133-158, Martinus Nijhoff (Leiden), at pp. 135-136.
[22] See supra n. 2, LOSC, Part XI; United Nations Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, (adopted 28 July 1994 (New York), in force 28 July 1996), 1836 UNTS 3; Egede, E., (2011), *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, Springer (New York); Baslar, K., (1997), *The Concept of the Common Heritage of Mankind in International Law*, Martinus Nijhoff (Leiden).
[23] Supra n. 2, LOSC, Arts. 55-57.
[24] Supra n. 2, LOSC, Art. 76.
[25] Supra n. 2, LOSC, Parts XII and XIII.

but sui generis spaces in which coastal states enjoy additional sovereign rights and responsibilities.[26]

During UNCLOS negotiations, the vast majority of issues could therefore be reduced down to this conflict between the freedom of flagged vessels to exploit; pitted against the rights of coastal and port states to regulate activities in nearby waters or to exploit the resources derived therefrom. This led to the unfortunate result that most states were deleteriously pre-occupied with *rights*, especially rights of ownership in resources, and neglected the opportunity to more thoroughly consider their respective *responsibilities*, or any consequent liability, for protecting the marine environment.[27] The practical result was that where flag states secured agreed 'rights' upon the ocean, they also assumed the attendant responsibilities, despite their practical and logistical unsuitability to regulate vessels at a distance.[28] Similarly, where rights were secured by coastal states, they were predominantly biased toward exploitation of resources with a lack of concomitant responsibility for protection.[29] Harrison makes a noteworthy remark that, by inferring a positive duty to protect the marine environment, the judgment on the Merits in the *South China Sea* arbitration in 2016 appears to finally hint at a gradual shift away from prioritising coastal state 'rights' above their 'responsibilities'.[30] Nevertheless, the essential question underneath remains what precisely is included in this positive

[26] Oana, A., 'Exclusive Economic Zone: The Concept of Sui Generis Area and its Implication for the Legal Order of the Seas', Vol. 20 (Year XIV) *Constanta Maritime University Annals* 187-190; Andreone, G. and Cataldi, G., (2014), 'Sui Generis Zones', in *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea*, D.J. Attard, M. Fitzmaurice and N.A. Martínez Gutiérrez (Eds.), 217-238, Oxford University Press (Oxford).

[27] Tsamenyi, M. and Hanich, Q., (2012), 'Fisheries Jurisdiction Under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States', 27(4) *International Journal of Marine and Coastal Law* 783–793; Andreone, G., (2015), 'The Exclusive Economic Zone', in *The Oxford Handbook on the Law of the Sea*, D.R. Rothwell, A.G.O. Elferink, K.N. Scott and T. Stephens (Eds.), 159-180, Oxford University Press (Oxford), at p. 179; König has referred to an 'enforcement deficit' (König, D., (2002), 'The Enforcement of the International Law of the Sea by Coastal and Port States', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1-15, at p. 10).

[28] E.g., Oanta, G.A., (2014), 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+ 20 Agenda', 16(2) *International Community Law Review* 214-235, at pp. 223-226; Soons, A.H.A., (2004), 'Law Enforcement in the Ocean', 3(1) *WMU Journal of Maritime Affairs* 3-16, at pp. 15-16; Henriksen, T., Hønneland, G. and Sydnes, A., (2006), *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, Martinus NIjhoff (Leiden), at pp. 46-47; Orrego Vicuña, F., (1999), *The Changing International Law of High Seas Fisheries*, Cambridge University Press (Cambridge), at pp. 200-268.

[29] High Seas Task Force, (2006), *Closing the Net: Stopping Illegal Fishing on the High Seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, Sadag SA (Bellegrade), (at: https://www.oecd.org/sd-roundtable/papers andpublications/39375276.pdf; accessed 18 December 2018), at pp. 41 and 52. See infra Chapter 5, Section 3(c).

[30] Harrison, J., (2017), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press (Oxford), at p. 24; *South China Sea Arbitration, Philippines v China*, Award, PCA Case No. 2013-19, 12 July 2016, Permanent Court of Arbitration, at para. 941.

obligation incumbent on coastal states and the substantive legal basis on which they can be found to actually hold international responsibility and legal culpability to the international community.[31]

Since the conclusion of the LOSC, there has been this continuing tension between flag state and non-flag state interests. This resistance from maritime states is an aspect of the wider fears of *horror jurisdictionis* ('creeping jurisdiction') of coastal states.[32] This concept entails powerful maritime states pre-empting interests of non-flag states in expanding their share of power or rights in the ocean's resources, as their claims gradually creep beyond strictly defined jurisdictional boundaries and freedoms concluded under the LOSC.[33] This tension between coastal state jurisdiction and the Freedom of the Seas is therefore no less acute today than many decades ago, with many expressing deep concern at the shifting balance in favour of coastal states who, through processes of 'creeping' or 'thickening' jurisdiction, are gradually curtailing flag state powers to freely navigate, exploit or militarise the ocean and strategically vital waterways.[34]

(c) Challenges of Allocating Flag, Coastal and Port State Jurisdiction within the UNESCO Convention

It was within this highly charged and rancorous political domain that the UNESCO Convention on the Protection of UCH had to walk a fine tightrope,[35] where all the efficacious proposals in the first draft became effectively flattened once wrung through the same political mangle.[36] As Dromgoole writes, because maritime activity is 'bound

[31] See also, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area, Advisory Opinion of the Seabed Disputes Chamber, 1 February 2011, ITLOS Case No. 17, International Tribunal for the Law of the Sea, (at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; accessed 18 December 2018) which explored the duty to protect the environment in relation to deep seabed mining activities.

[32] Tuerk, H., (2013), *Reflections on the Contemporary Law of the Sea*, Martinus Nijohff (Leiden), at p. 159.

[33] Ibid, Tuerk, at p. 159.

[34] Ventura, F. and Mayer, V.A. (2018), 'Revisiting the Critique Against Territorialism in the Law of the Sea: Brazilian State Practice in Light of the Concepts of Creeping Jurisdiction and Spoliative Jurisdiction', 15(1) *Brazilian Journal of International Law* 161-179; Yang, H., (2008), *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Springer (New York); Bautista, L., (2015), 'The Role of Coastal States', in *Routledge Handbook of Maritime Regulation and Enforcement*, S. Kaye and R. Warner (Eds.), 59-70, Routledge (London); Scovazzi, T., (2006), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at p. 292.

[35] Dromgoole, S., (2013), 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001', 38 *Marine Policy* 116-123, at p. 116; Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 420.

[36] The 'grueling negotiations … resonated and resurrected old debates and tensions during the [LOSC] Conferences' (Bautista, L., (2005), 'Gaps, Issues, and Prospects: International Law and the Protection of

up with, and impacts upon, matters of enormous strategic, military and economic importance inevitably means that heritage protection considerations may be sacrificed for the sake of much broader political imperatives.'[37] Indeed, coastal state delegates attending the UNESCO Convention negotiations were often disparagingly viewed as opportunistically taking 'another bite at the jurisdictional apple' in an attempt to renegotiate the distribution of wealth and regulatory power further in their favour.[38] Just like the UNCLOS III negotiations,[39] it was Greece who were one of the major proponents of coastal state protection of submerged heritage lying on the vulnerable continental shelf during the UNESCO negotiations, along with many states rich in UCH such as in the Caribbean and Latin America.[40] Nevertheless, it was predictably the dominant maritime powers, such as the United States, United Kingdom, Russia, Japan, Germany, France, Spain, Netherlands and Norway, who were firmly against such creeping jurisdiction of coastal states and insisted on maintaining the strict limits on coastal state prescriptive jurisdiction provided under the LOSC.[41]

As a result, as is explored in the sections that follow, in order to allay the concerns of the dominant maritime states, the UNESCO negotiations resolved to reinstate the present balance of rights and responsibilities in the ocean, slanted as they are in favour of flag state control and coastal state exploitation of resources in their wider waters.[42] Instead, coastal states would continue to be limited to the current lack of jurisdictional authority over activities directed at UCH, with some exceptions,[43] with the simple solution of

Underwater Cultural Heritage', 14 *Dalhousie Journal of Legal Studies* 57-89, at p. 67); Ibid, Carducci, at p. 420.

[37] Supra n. 35, Dromgoole, at p. 116.

[38] Supra n. 12, Blumberg, at p. 499; González, A.W., (2006), 'The Shades of Harmony: Some Thoughts on the Different Contexts that Coastal States Face as Regards the 2001 Underwater Cultural Heritage Convention', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 308-312, Cambridge University Press (Cambridge), at p. 308; Aznar, M.J., (2004), 'Review: Archaeological and/or Historic Valuable Shipwrecks in International Waters. Public International Law and What it Offers; Eke Boesten', 15(3) *European Journal of International Law* 603-605, at p. 603; UNESCO, (1997), *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage*, Executive Board, 151st Session, (12 March 1997, Paris), UN Doc. 151 EX/10, Annex I, at para. 27.

[39] See Chapter 1, Section 4.

[40] Forrest, C., (2002), 'A New International Regime for the Protection of Underwater Cultural Heritage', 51(3) *International Comparative Law Quarterly* 511-554, at p. 552; Supra n. 12, Blumberg, at p. 499; Vadi, V., (2012), 'War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law', 37(2) *Tulane Maritime Law Journal* 333-378, at p. 366.

[41] Supra n. 12, Blumberg, at p. 499. Many state delegates attending the UNESCO negotiations opposed the concept of a cultural protection zone, such as Germany, Italy, Netherlands, Republic of Korea, Tunisia and United Kingdom (see supra n. 38, UNESCO).

[42] Varmer, O., (2014), 'Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf', 33(2) *Stanford Environmental Law Journal* 251-286, at pp. 256-257.

[43] See infra Section 2(b) and 2(c).

asking that relevant states "cooperate" for new activities directed at UCH. Naturally, a number of challenges are inherent within this cooperation system in terms of: the question of sovereign immunity;[44] the utility of the cooperation system created; the ongoing management of conflict between coastal and flag states; the identification of 'verifiably linked' states;[45] and questions over the underlying norms and the efficacy of any agreement to 'cooperate'.[46]

2. The UNESCO Convention as a Commitment to Cooperate

The original Buenos Aires Draft Convention favoured an extension of coastal jurisdiction by using a 'Cultural Protection Zone', permissive of sovereign rights to develop and enforce UCH protection laws across the continental shelf.[47] When this idea confronted leading maritime states in the UNESCO negotiations it was quickly derailed in preference

[44] There is further debate on the application of sovereign immunity to the wrecks of warships across the various maritime jurisdictional zones, but it has not been a focus of this study. See, generally, for example: Forrest, C., (2003), 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage', 34(1) *Ocean Development and International Law* 41-57; Ronzitti, N., (2012), 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law', in *Yearbook of the Institute of International Law - Volume 74 (Session of Rhodes, 2011),* 130-177, Editions A. Pedone (Paris); Bederman, D.J., (2000), 'Rethinking the Status of Sunken Warships', 30(1-2) *Ocean Development and International Law* 97-125; Harris, J.R., (2002), 'Protecting Sunken Warships as Objects Entitled to Sovereign Immunity', 33(1) *The University of Miami Inter-American Law Review* 101-126; Yeates, J.W., (2000), 'Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels', 12(2) *University of San Francisco Maritime Law Journal* 359-388; Aznar, M.J., (2003), 'Legal Status of Sunken Warships "Revisited"', in *Spanish Yearbook of International Law: Volume IX*, 61-101, Koninklijke Brill (Leiden); Walker, J.E., (2000), 'A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations', 12(2) *University of San Francisco Maritime Law Journal* 311-358; Roach, J.A., (1996), 'Sunken Warships and Military Aircraft', 20(4) *Marine Policy* 351-354; Williams, M., (2000), ''War Graves' and Salvage: Murky Waters', 7(5) *International Maritime Law* 151-158; Aznar, M.J., (2010), 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', 25(2) *International Journal of Marine and Coastal Law* 209-236.

[45] Similarly, more could be said on the issue of determining which states have preferable rights, based on a 'verifiable link, especially a cultural, historical or archaeological link' to UCH, but which was beyond the focus of this study. See, for example: Huang, J., (2013), 'Chasing Provenance: Legal Dilemmas for Protecting States with a Verifiable Link to Underwater Culture Heritage', 84 *Ocean and Coastal Management* 220-225; Huang, J., (2013), 'Odyssey's Treasure Ship: Salvor, Owner, or Sovereign Immunity', 44(2) *Ocean Development and International Law* 170-184; Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261.

[46] See Sections 2 and 3.

[47] International Law Association, (1994), 'Cultural Heritage Law Committee - Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage Final Report Part II: Report', in *Report of the Sixty Sixth Conference, Held at Buenos Aires, Argentina 14-20 August 1992*, J. Crawford and M. Williams (Eds.), 432-451, International Law Association (London), Art. 1. It has been suggested that the 200-mile limit for a 'cultural heritage zone', which was also proposed by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia during UNCLOS III (UN Doc. C.2/Informal Meeting/43/Rev. 3, 27 March 1980), originated in the initiative of the 1978 Roper Recommendations (Nordquist, M.H., Rosenne, S. and Sohn, L.B., (1989), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V*, M.H. Nordquist (Series Editor-in-Chief), Martinus Nijhoff (Leiden), at pp. 159-161).

for the 'finely balanced'[48] allocation of coastal, port and flag state power under the LOSC.[49] Despite this last-ditch attempt to preserve the flag state model, state practice actually shows clear divergence. For example, the Buenos Aires drafters were aware that many states *already* declared prescriptive jurisdiction over UCH on their continental shelves,[50] for example Australia,[51] Ireland,[52] Spain,[53] Norway,[54] Cape Verde[55] and Portugal,[56] with other states measuring this jurisdiction as commensurate with the exclusive economic zone, such as Denmark,[57] Morocco[58] and Jamaica.[59] In interview, Williams pointed out that, with the introduction of the Marine and Coastal Access Act 2009, even in the United Kingdom there is now a legal requirement to obtain a licence before lifting any object from the entire continental shelf area.[60]

Regardless, at the time of the negotiations, because powerful maritime states feared the consolidation or expansion of coastal state prescriptive jurisdiction over the broad continental shelf (horror jurisdictionis), they resisted any formal extension of coastal state

[48] UNESCO, (1995), 'Observations by States and the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, United Nations', in *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, General Conference, 28th Session, (4 October 1995), UN Doc. 28 C/39, at Annex, p. 5.

[49] The United States, United Kingdom and Netherlands were three states most strongly opposed the extension of coastal state authority under UNCLOS III (Caflisch, L., (1982), 'Submarine Antiquities and the International Law of the Sea', 13 *Netherlands Yearbook of International Law* 3-32, at p. 17).

[50] 'Measures have been taken by Belgium, Sri Lanka, Spain, the Seychelles and Turkey to exercise various forms of control over historic wrecks beyond the zones permitted by UNCLOS' (Smith, H.D. and Couper, A.D., (2003), 'The Management of Underwater Cultural Heritage', 4(1) *Journal of Cultural Heritage* 25-33, at p. 32).

[51] Historic Shipwrecks Act 1976, (Act No. 190 of 1976) (Australia), s. 28.

[52] National Monuments (Amendment) Act 1987, (No. 17 of 1987) (Republic of Ireland), s. 3(1).

[53] Law 16/1985, on Spanish Historical Heritage, (Official State Bulletin of 29 June 1985) (Spain), Art. 40.

[54] Royal Decree of 8th December 1972 relating to Exploration and Substrata of the Norwegian Continental Shelf (taken from: Roach, J.A. and Smith, R.W., (2012), *Excessive Maritime Claims*, 3rd Edn., Martinus Nijhoff (Leiden), at p. 558).

[55] Law No. 60/IV/92 Delimiting the Maritime Areas of the Republic of Cape Verde, 10 December 1992 (Cape Verde), Art. 28.

[56] Decreto Lei No. 289/93 Establishing Standards for Underwater Archaeological Cultural Heritage, 21 August 1993 (Portugal) (taken from: Strati, A., (1995), *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, Martinus Nijhoff (Leiden), at p. 289).

[57] Act No. 9, 3 January 1992, on the Protection of Nature (Denmark), Art. 1(2) (taken from: Bangeert, K., (1997), 'Denmark and the Law of the Sea', in *The Law of the Sea: The European Union and Its Member States*, T. Treves and L. Pineschi (Eds.), 97-126, Martinus Nijhoff (Leiden), at p. 109).

[58] Act No. 1-81 of 18th December 1980, Promulgated by Dahir No. 1-81-179 of 8th April 1981, Establishing a 200-Nautical-Mile Exclusive Economic Zone off the Moroccan Coasts (Morocco), Art. 5.

[59] The Exclusive Economic Zone Act, (No. 33 of 1991) (Jamaica), Art. 4(c)(i).

[60] Supra n. 4, Williams. See, e.g., Marine Management Organisation, (2016), 'Man found guilty of marine licensing offences relating to salvage of shipwreck', 23 May 2016, (at: https://www.gov.uk/government/news/man-found-guilty-of-marine-licensing-offences-relating-to-salvage-of-shipwreck; accessed 18 December 2018); Marine Management Organisation, (2018), 'Master and owner charged for illegal salvage of sunken vessel', 7 August 2018, (at: https://www.gov.uk/government/news/master-and-owner-charged-for-illegal-salvage-of-sunken-vessel; accessed 18 December 2018).

authority.[61] Similarly, many have remarked how the LOSC has been heralded as such a momentous achievement of that generation of international lawyers, that the same generation were nervous of undermining the balance of power so soon. The resulting UNESCO Convention thus resembles a false promise; recognising the need to protect UCH across EEZs and continental shelves, but providing no formal legislative means by which coastal states can do so.[62] Exactly the same occurred with regard to the LOSC, wherein battle lines between the proposal for a CPZ and the United States proposal of a 'general duty' of flag states resulted in a victory for the most powerful state, accompanied by a tokenistic acknowledgement of the numerous states expressing concern over UCH beyond narrow territorial seas.[63]

Thus, to attract necessary support of leading maritime states – most of whom abstained or signed against the final agreement anyway[64] – the decision was taken to perpetuate the Freedom of the Seas. This was reinforced by Article 3, which expressed that the UNESCO Convention is entirely secondary to the LOSC: it does not seek to alter any aspect of the LOSC and must always be interpreted in a manner consistent with the latter's constitutional ambit.[65] The Convention instead directs UCH protection through a system of state cooperation, undergirded by ad hoc administration by the UNESCO MOP and Secretariat and the appointment of appropriate 'Coordinating States', for all activities directed at UCH. This state cooperation scheme is detailed throughout Articles 7 (territorial sea and internal waters), 8 (contiguous zone), 9 and 10 (EEZ and continental shelf), 11 and 12 (the Area).[66] In summary, the Coordinating State is intended to cooperate closely with interested states, such as the flag states of sunken vessels or any other states with a 'verifiable cultural, historical or archaeological link',[67] and with

[61] Supra n. 34, Scovazzi, at pp. 289-290.
[62] Supra n. 34, Scovazzi, at p. 290.
[63] Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at pp. 32-34.
[64] See Chapter 1, Section 4 (Rejected: Russian Federation, Norway, Turkey and Venezuela / Abstained: Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland, Uruguay and United Kingdom). Note also that the United States was also formally against but did not vote as was not a member of UNESCO at the time; 'When the United Kingdom eventually did not sign the Convention this was regarded by many as an act of bad faith which appears to have occasioned very real resentment.' (González, A.W., O'Keefe, P.J. and Williams, M., (2009), 'The UNESCO Convention on the Protection of the Underwater Cultural Heritage: A Future for our Past?', 11(1) *Conservation and Management of Archaeological Sites* 54-69, at p. 65 (per Williams)).
[65] Supra n. 1, UNESCO Convention, Art. 3. Also, see Article 311 of LOSC (supra n. 2), which anticipates the development of future *lex specialis* which diverge from LOSC (supra n. 34, Scovazzi, at p. 290).
[66] Articles 9 and 11 of the UNESCO Convention (supra n. 1) deal with the *discovery* and *reporting* of discovery of UCH in the EEZ/Continental Shelf and Area respectively, whereas Articles 10 and 12 regulate *activities directed at* UCH in these zones.
[67] Supra n. 1, UNESCO Convention, Arts. 9(5), 10(3)(a), 11(4) and 12(2).

UNESCO – and the International Seabed Authority when the UCH is located in the Area[68] – on the best measures to protect UCH in accordance with the Convention.[69] When activities are directed at UCH in the continental shelf or EEZ the first choice for Coordinating State is the coastal state for that zone.[70] If in the Area, it is between linked states and UNESCO to determine who has the strongest link and appointed as coordinating state.[71]

The powers handed to coastal states under this cooperation regime are vague and lacking in some important detail. For example, one notable right for coastal states (or Coordinating States) allows them to take 'all practicable measures', prior to any negotiations, to protect UCH which is in 'immediate danger'.[72] This has been criticised by some as offering a floodgate to coastal state intervention.[73] However, the logic of this protection – intended to provide authority to act immediately in emergency situations without the need to engage in unhurried state negotiations – is entirely astute.[74] If it were meant as a backdoor to coastal state protection, then identical rights would not have been assigned to all states in the Area.[75] Coastal and Coordinating States also have rights to implement measures of protection . . . agreed by the consulting states',[76] 'issue all necessary authorizations for such agreed measures',[77] and they 'may conduct any necessary preliminary research' on UCH in order to support such processes.[78] This is likely to provide coastal states with sufficient authority to coordinate inclusive multilateral agreements which create marine protected areas around specific sites, such as perhaps developing a protected zone around the *Titanic* wreck on Canada's outer continental shelf.[79] However, beyond this affirmation that coastal states can coordinate ad hoc negotiations, their rights to protect UCH are quite limited.

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[68] Supra n. 1, UNESCO Convention, Arts. 11(2) and 12(2).
[69] Supra n. 1, UNESCO Convention, Arts. 10(3)(a), 10(5)-(7), 12(2) and 12(4)-(6).
[70] Supra n. 1, UNESCO Convention, Arts. 10(3)(b).
[71] Supra n. 1, UNESCO Convention, Arts. 12(2).
[72] Supra n. 1, UNESCO Convention, Art. 10(4).
[73] Dromgoole refers to Article 10(4) of the Convention as an 'area of unease' among powerful maritime states 'where the precise nature of the measures envisaged is unclear' (Supra n. 35, Dromgoole, at p. 119); Murphy, S.D., (2002), 'U.S. Concerns Regarding UNESCO Convention on Underwater Heritage', 96(2) *American Journal of International Law* 468-470, at pp. 469-470.
[74] Supra n. 35, Carducci, at pp. 430-431; Supra n. 34, Scovazzi, at p. 290.
[75] Supra n. 1, UNESCO Convention, Art. 12(3).
[76] Supra n. 1, UNESCO Convention, Art. 10(5)(a) and 12(4)(a).
[77] Supra n. 1, UNESCO Convention, Art. 10(5)(b) and 12(4)(b).
[78] Supra n. 1, UNESCO Convention, Art. 10(5)(b). This right is not available for Coordinating States in the Area (i.e., outside of the Coordinating State's EEZ or continental shelf).
[79] Martin, J.B., (2018), 'Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: The *Titanic* and *Lusitania* as World Heritage Sites', 33(1) *International Journal of Marine and Coastal Law* 116-165.

The obedience of the UNESCO regime to the LOSC, along with the regulatory lacuna under the latter's treatment of UCH in areas beyond territorial waters, is especially apparent in Article 10(2).[80] This clause confirms that a state party with UCH located on its continental shelf or EEZ can only 'prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction' under international law and the LOSC.[81] Thus it was consequently surrendered that, in accordance with the wishes of the US delegates,[82] UCH protection can only be achieved through the enforcement of unrelated jurisdictional rights under the LOSC, such as mineral and natural resources, mining, health and safety, fishing, construction, scientific research and navigation rights.[83] Many maritime powers nervous of creeping jurisdiction have, for example, referred to LOSC Article 77 and the sovereign right to protect against disturbance of natural resources embedded in the continental shelf, which could be invoked through UNESCO Convention's Article 10(2). This would be on the grounds that, as UCH will likely be encrusted with barnacles and living organisms, Article 77 provides sufficient indirect jurisdiction to prevent disturbance thereof.[84]

Leading scholars such as O'Keefe seem satisfied with this maladroit protection, arguing that the power assigned to states is 'broad and can be used to provide extensive protection' and that a 'determination by a state that its sovereign rights are suffering is not likely to be put aside.'[85] Scovazzi, however, has rightly questioned the suitability of only protecting UCH indirectly through wholly unrelated subject-matter rules.[86] In particular, stretching Articles 56 over 'non-living resources' or Article 77 over 'natural resources'

[80] Risvas referred to a 'widespread consensus' that there remains a 'legal vacuum' with regard to the protection of UCH on the continental shelf (supra n. 6, Risvas, at pp. 582-583).
[81] Supra n. 1, UNESCO Convention, Art. 10(2).
[82] Varmer, O., Gray, J. and Alberg, D., (2010), 'United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 129-141, at p. 132.
[83] Supra n. 34, Scovazzi, at p. 287.
[84] O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at p. 68; Supra n. 44, Aznar, 'Legal Status', at p. 86. In a similar manner, states could protect their rights to the exploitation of non-living resources under LOSC (supra n. 2), Art. 56. Dromgoole also discusses the rights under the LOSC to erect structures (Arts. 60 and 80), exploit natural resources (Art. 77), or to regulate drilling 'for any purpose' (Art. 81), as possible, yet ineffectual, means to regulate UCH (Dromgoole, S., (2010), 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage', 25(1) *International Journal of Marine and Coastal Law* 33-61, at pp. 39-40). See also, supra n. 42, Varmer, at p. 273.
[85] Ibid, O'Keefe, at p. 69.
[86] Supra n. 34, Scovazzi, at p. 291; By questioning the suitability of the LOSC's Articles 60, 77, 80, 81 as mechanisms for the protection for UCH, Dromgoole also does so inadvertently (supra n. 84, Dromgoole, at pp. 39-40).

is unlikely to be accepted by all.[87] Similarly, Dromgoole reminds us that the negotiators at UNCLOS specifically dealt with UCH in the contiguous zone, in recognition that rights over UCH do not exist in the continental shelf.[88] States in dispute could very easily refuse to interpret the coastal states rights over indirect issues as capable of being twisted to entirely separate subjects,[89] especially when considered against Article 3 of the UNESCO Convention expressing the Convention's overriding deference to the LOSC.

Given strong adherence among the legal community towards the LOSC, an interpretation favouring UCH protection by completely contorting the 1982 Convention, is not assured. As Cogliati-Bantz and Forrest make clear, Article 3 was very intentionally included within the UNESCO Convention to ensure that any element which is potentially opposable to the LOSC is interpreted in favour of the latter.[90] Moreover, the ILC's Commentary on Article 68 in the UN 1958 Convention on the Continental Shelf, on which Part VI of the LOSC is held out to be a codified reiteration, *explicitly* removes the protection of UCH on the continental shelf from the purview of coastal states and was not formally rebutted at UNCLOS III.[91] Critically, Article 10(2) also does not *equate* UCH with the resources that coastal states can exclusively regulate, but simply reiterates that coastal states can only *prevent interference with their exclusive rights* to exploit their living resources, minerals and hydrocarbons. Coastal states might therefore be under strain if arguing that they intended to *exploit* such living resources, such as encrusted barnacles on shipwrecks. In sum, the ability to protect UCH is heavily constrained within the existing empty scheme under the LOSC.

Furthermore, coastal state jurisdiction in these zones can be limited. In many cases it is not prescriptive, but limited to the enforcement of narrow rights contained in

[87] Scovazzi, T., (2006), 'The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R. Barnes, R. and D.M. Ong (Eds.), 120-136, Oxford University Press (Oxford), at p. 124.
[88] Supra n. 86, Dromgoole, at p. 45.
[89] Such a right in UCH 'bears no relationship' with a right over other matters (supra n. 35, Dromgoole, at p. 119).
[90] Cogliati-Bantz, V.P. and Forrest, C.J., (2013), 'Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea', 2(3) *Cambridge Journal of International and Comparative Law* 536-561.
[91] International Law Commission, (1956), *Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956*, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, A/3159, at p. 298. See, for example, the views of Japan (UNESCO, (2000), *Svnoptic Report of comments on the Draft Convention on the Protection of the Underwater Cultural Heritage*, (3-7 July 2000, Paris), UN Doc. CLT-2OOO/CONF.201/3, UNESCO (Paris), at p. 2); Ibid, Cogliati-Bantz and Forrest, at pp. 554-555.

internationally agreed rules, such as those developed at the IMO.[92] For example, a number of commentators have examined the notion of utilising LOSC rights to regulate marine scientific research (MSR) under Article 246.[93] However, again there are difficulties with defining the precise meaning of MSR under the LOSC and the strict limitation placed on coastal states under LOSC Article 246, paragraphs (3) to (5).[94] Here, coastal state enforcement can be sidestepped if it is reasonably argued that such UCH-directed projects are for the benefit of humanity ('pure research'), rather than with a view to exploitation of resources ('applied research').[95] Given that US jurisprudence and much of the supporting academic commentary has suggested that treasure salvage is beneficial to humanity, this loophole is particularly awkward. Furthermore, again it appears that negotiations during UNCLOS on the meaning of MSR came to the conclusion that underwater archaeology was explicitly excluded.[96]

Finally, it is likely that most of the threats to UCH in this zone, as shown by Chapter 2, will occur illicitly, covertly or accidentally. The critical question therefore also becomes what rights coastal states have to board and inspect vessels suspected of looting, in order to gather evidence or to effectively police activity. However, unlike *living* resources,[97] there is no right under the LOSC for a coastal state to intercept or board vessels suspected of interfering with *non-living* natural resources in the EEZ or continental shelf.[98] Indeed,

[92] Supra n. 2, LOSC, Arts. 56(1)(b) and 56(2); International Maritime Organization, (2012), *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 19 January 2012, LEG/MISC.8, IMO (London), at pp. 8-10; Supra n. 27, Andreone, at p. 176.
[93] Supra n. 86, Dromgoole; Boesten, E., (2002), *Archaeological and/or Historic Valuable Shipwrecks in International Waters: Public International Law and What It Offers*, TMC Asser Press (The Hague), at pp. 65-71; Croff, K., (2009), 'The Underwater Cultural Heritage and Marine Scientific Research in the Exclusive Economic Zone', 43(1) *Marine Technology Society Journal* 93-100; Lee, K.G., (2006), 'An Inquiry into the Compatibility of the UNESCO Convention 2001 with UNCLOS 1982', in *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage*, L.V. Prott (Ed.), 20-26, Institute of Art & Law (Builth Wells), at p. 25; Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.
[94] Supra n. 86, Dromgoole, at pp. 53-54.
[95] Aznar, M.J., (2017), 'The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals', in *Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime*, C. Espósito, J. Kraska, H.N. Scheiber and M.S. Kwon (Eds.), 124-147, Brill Nijhoff (Leiden), at pp. 140-142; Supra n. 86, Dromgoole, at pp. 41-43.
[96] Supra n. 56, Strati, at p. 262; Soons, A.H.A., (1982), *Marine Scientific Research and the Law of the Sea*, Kluwer Law (Alphen), at p. 275.
[97] Supra n. 2, LOSC, Art. 73.
[98] Supra n. 27, Andreone, at p. 170; Shearer, I.A., (1986), 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', 35(2) *International and Comparative Law Quarterly* 320-343, 335-336; The LOSC only permits states to board and inspect other vessels, under very strict conditions, in order to ensure compliance with fisheries law (supra n. 2, LOSC, Art. 73), when they have reasonable grounds for suspecting piracy (Art. 105), or for slave trading, unauthorised broadcasting or sailing without a flag (Art. 110), see Beckman, R. and Davenport, T., (2012), 'The EEZ Regime: Reflections after 30 Years', in *Securing the Ocean for the Next Generation: Papers from a Law of the Sea Institute*, UC Berkeley-Korea Institute of Ocean Science and Technology Conference (May 2012, Seoul), H. Scheiber and M. Kwon

there remains much uncertainty on whether 'sovereign rights' over non-living resources under Articles 56 and 77 include this right,[99] particularly when considered against explicit prohibition of interference with free navigation in the waters in the EEZ and continental shelf.[100] Much of the academic commentary in this field suggests that, in connection with the right of hot pursuit,[101] there needs to be a sufficient nexus between the vessel and the illicit activity at the time of interdiction.[102] Unless looters or incidental destructors are caught red-handed, therefore, Article 10(2) may be of little value.

For all of these reasons, a number of studies have confirmed that the UNESCO Convention does not in any sense interfere with any of the existing rules on jurisdiction under the historic Law of the Sea Convention.[103] Indeed, during interviews, Williams described the argument about incongruence with the LOSC and the UNESCO Convention as 'swinging' by maritime powers intent on maintaining the present flag state system.[104] Manders also said that he does not see this supposed conflict between the LOSC and the UNESCO Convention.[105] Further, in 2013, Cogliati-Bantz and Forrest provided a persuasive argument that the UNESCO Convention is entirely in harmony with the balance of state interests negotiated under the LOSC.[106] This is all despite the limitations of the LOSC being the very issue which the UNESCO Convention was intended to address.

(Eds.), Berkeley Law (Berkeley), (at: https://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf; accessed 18 December 2018), at pp. 20-21.

[99] Mossop, J., (2016), *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities*, Oxford University Press (Oxford), at pp. 204-215; Guilfoyle, D., (2009), *Shipping Interdiction and the Law of the Sea*, Cambridge Studies in International and Comparative Law, Cambridge University Press (Cambridge), at p. 15.

[100] Supra n. 2, LOSC, Art. 78.

[101] Supra n. 2, LOSC, Art. 111.

[102] Supra n. 99, Mossop, at pp. 205-207; Wolfrum, R. and Kelly, E., (2013), 'Joint Separate Opinions of Judge Wolfrum and Judge Kelly', in *The 'Arctic Sunrise' Case*, Kingdom of the Netherlands v. Russian Federation, Order of 22nd November 2013, ITLOS Case No 22, 256-261, (at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Wolfrum_Kelly_221113.pdf; accessed 1 June 2019), at paras. 12-13.

[103] Supra n. 90, Cogliati-Bantz and Forrest; Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File; UK UNESCO 2001 Convention Review Group, (2014), *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom – Final Report*, United Kingdom National Commission for UNESCO (London), (at: https://www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf; accessed 18 November 2018).

[104] Supra n. 4, Williams.

[105] Supra n. 103, Manders. See The Netherlands Advisory Committee on Issues of Public International Law, (2011), Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage (Translation), Advisory Report No. 21, (December 2011, The Hague), (at: https://www.peacepalacelibrary.nl/ebooks/files/357963652.pdf; accessed 18 December 2018), at p. 12; González, A.W., (2002), 'Negotiating the Convention on Underwater Cultural Heritage: Myths and Reality', in *The Protection of the Underwater Cultural Heritage: Legal Aspects*, G. Camarda and T. Scovazzi (Eds.), 105-111, Giuffrè (Milan).

[106] Supra n. 90, Cogliati-Bantz and Forrest.

3. The UNESCO Convention and its Cooperation Scheme

A truly decisive element of the Convention, bringing into question much of its central value, is its reliance on an agreement between states to *cooperate* in the protection of UCH.[107] This has even been described as the Convention's 'fundamental principle'.[108] As O'Keefe writes, '[c]o-operation among States is *crucial* for achieving the objectives of the . . . Convention.'[109] Guérin and Egger also refer to cooperation with flag states as being 'crucial' for achieving the protection of UCH.[110] The major difficulty with making such a hortatory agreement to cooperate as the cornerstone agreement of the Convention is that we *already* had a global agreement to cooperate. Indeed, if UNCLOS III had already achieved anything, it was concluding an agreement between states to 'cooperate' in the protection of UCH.[111] The very raison d'être of the UNESCO Convention was to flesh out this extant arrangement under LOSC Article 303(1), particularly in areas beyond the territorial sea.[112] The UNESCO website alleges that the UNESCO Convention 'provides a detailed State cooperation system'[113] and has published a page setting out how this state cooperation scheme works.[114] However, looking at this system more closely, beyond appointing a Coordinating State – who shall equivocally 'act on behalf of the States Parties as a whole and not in its own interest'[115] and consult other "linked" states[116] – there is no more guidance on how such cooperation should be carried out, let alone, conducted successfully (see infra Section 4).[117]

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[107] Supra n. 1, UNESCO Convention, Art. 2(2).
[108] Supra n. 5, Dromgoole, at p. 344.
[109] Supra n. 84, O'Keefe, at p. 90 (emphasis added); 'I do believe that an effective protection of UCH necessarily passes through the cooperation between states.' (Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File).
[110] Guérin, U. and Egger, B., (2010), 'Guaranteeing the Protection of Submerged Archaeological Sites Regardless of their Location: The UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)', 5(2) *Journal of Maritime Archaeology* 97-103, at p. 101.
[111] Supra n. 2, LOSC, Art. 303(1); Scovazzi, T., (2012), 'The Law of the Sea Convention and Underwater Cultural Heritage', 27(4) *International Journal of Marine and Coastal Law* 753-761, at p. 755.
[112] Supra n. 6, Risvas, at p. 584; Supra n. 35, Carducci, at p. 421; Supra n. 84, O'Keefe, at p. 50; Supra n. 40, Vadi, at p. 361.
[113] UNESCO, 'Underwater Cultural Heritage: About the Convention on the Protection of the Underwater Cultural Heritage', (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/; accessed 18 December 2018).
[114] UNESCO, 'Underwater Cultural Heritage: The State Cooperation System', (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/state-cooperation-system; accessed 18 December 2018).
[115] 'Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law' (Scovazzi, T., (2001), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 11(1) *Italian Yearbook of International Law* 9-24, at p. 19).
[116] Supra n. 1, UNESCO Convention, Arts. 10(5), 10(6), 12(4) and 12(6).
[117] Scovazzi describes the regime has having a 3-step model of 'reporting-consultations-urgent measures' (supra n. 34, Scovazzi, at p. 290).

This reliance on ad hoc cooperation was not done explicitly, except for the occasional case relating to the treatment of a flag state's warship in another coastal state's territorial waters.[118] Instead, it was tacitly included by leaving out any formal rules or agreements on how to resolve future conflicts between states on the different issues. For example, should a state sanction an archaeological recovery on a merchant vessel which is resting on another state's continental shelf, there is little contained in the 'Coordinating State' regime to elucidate how such negotiations should be conducted.[119] Instead, all states are to be firmly guided by their general duty to cooperate with one another under Article 2(2).

It can therefore be seen that there is something of a cooperation gap in the UNESCO Convention: it calls on states to cooperate, but provides no framework, structure or rules by which such cooperation must be carried out. While Article 19 attempts to expand and provide clarity on the concept of "cooperating", it only deals with administrative and research-based tasks like collaboration over archaeological projects or dissemination of academic research and information sharing.[120] It provides no detail on how effective cooperation is to be carried out over UCH *protection*[121] or the markers against which compliance can be evaluated.[122] The Convention does not even clarify who is required to collaborate with whom, other than ensuring that states with verifiable cultural, historical or archaeological links are also consulted.[123] At once, therefore, states might dispute what powers a Coordinating State is actually intended to possess. For example, Coordinating States overseeing activities on their continental shelf might determine that they have the deciding vote in matters of deadlock; whereas states with a verifiable link would say that Coordinating States are merely neutral administrators who facilitate negotiations.

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[118] Supra n. 1, UNESCO Convention, Art. 7(3); Supra n. 36, Bautista, at pp. 75-76; Rau, M., (2002), 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea', 6(1) *Max Planck Yearbook of United Nations Law* 387-464.

[119] Supra nn. 66-102 and 115-117.

[120] Although, some of the detail can be provided additionally by the Rules and the UNESCO Manual for Activities Directed at UCH (Supra n. 1, UNESCO Convention, Annex I: Rules Concerning Activities Directed at Underwater Cultural Heritage, Rules 2 and 17; Maarleveld, T.J., Guérin U. and Egger, B. (Eds.), (2013), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO (Paris)).

[121] Supra n. 35, Dromgoole, at p. 119; Zhao, Y.J., (2008), 'The Relationships Between Three Multilateral Regimes Concerning the Underwater Cultural Heritage', in *Le patrimoine culturel de l'humanité / The Cultural Heritage of Mankind*, J.A.R. Nafziger, J.A.R. and T. Scovazzi (Eds.), 601-642, Brill Nijhoff (Leiden), at p. 619.

[122] It is 'difficult to identify the normative implications of the duty to cooperate and more specifically how a state can be in breach thereof' (supra n. 6, Risvas, at p. 578).

[123] Supra n. 6, Risvas, at p. 576.

Criticism has been levied against the extant 'general duty' under LOSC's Article 303(1), which would therefore apply to the same general duty under Article 2(2) of the UNESCO Convention. Caflisch, for example, stated that it is 'far too general and vague to have any significant normative content.'[124] Risvas, also seriously questioned its normative base, saying that the duty is 'too general and too unclear'[125] and much will always depend on context and the maritime zone in question.[126] Concerningly, while promoting this approach which maintains the status quo and is exclusively reliant on ad hoc cooperation, Blumberg equally concedes that the duty is 'hortatory only'.[127] Nevertheless, Scovazzi has more clearly identified that the duty to cooperate in the protection of UCH under Article 303(1) 'is not devoid of meaning'.[128] Referring directly to the judgment of the ICJ in the *North Sea Continental Shelf* case, Scovazzi reminds us that a duty of international cooperation refers to acting in good faith and engaging in meaningful negotiations, along with a genuine intention to come to an agreement, rather than merely going through a formal process.[129] Risvas also draws our attention to the *Lac Lanoux* case, where the court determined that a duty to cooperate held by France with Spain over the management of their respective portions of a shared lake, only required them to merely *consider the interests* of the other and not any form of shared decision-making.[130]

It could also be argued that the Cooperation Scheme developed throughout Articles 7 to 12 is unnecessarily complicated. As Williams asks, why did they need such a 'horrendously complex' system?[131] 'They would have been better off just saying that coastal states regulate activities directed at UCH in the EEZ/continental shelf, but requiring that they consult other interested states with verifiable links.'[132] Similarly, Forrest has described the system for sharing information throughout Articles 7 to 12 as

[124] Supra n. 49, Caflisch, at p. 20; c.f., Oxman somehow concludes that Art 303(1) is 'fairly specific' on issues of title and use, unlike the 'sweeping conceptual generalities of article 149' (Oxman, B.H., (1988), 'Marine Archaeology and the International Law of the Sea', 12(3) *Columbia VLA Journal of Law and the Arts* 353-372, at p. 362).
[125] Supra n. 6, Risvas, at p. 571.
[126] Supra n. 6, Risvas, at pp. 568-569; Also e.g., Directive 2014/89/EU of the European parliament and of the council of 23 July 2014 establishing a framework for maritime spatial planning, OJEU L257/135, Preamble, at para. 20.
[127] Supra n. 12, Blumberg.
[128] Supra n. 87, Scovazzi, at p. 122
[129] Supra n. 87, Scovazzi, at p. 122; *North Sea Continental Shelf case, Germany v. Denmark, Germany v. Netherlands, Merits, Judgment*, 20 February 1969, ICJ Reports 3, International Court of Justice, at para. 85; Supra n. 6, Risvas, at pp. 563-569.
[130] Supra n. 6, Risvas, at p. 569; *Affaire du lac Lanoux (Espagne, France)*, 16 November 1957, XII *Reports of International Arbitral Awards* 281-317, at p. 307.
[131] Supra n. 4, Williams.
[132] Supra n. 4, Williams.

'overly bureaucratic and potentially time consuming'.[133] Meanwhile, Firth rightly defends the notion of shared sovereignty in the ocean space, saying that the concept of all states being encouraged to share and cooperate in this zone 'is a positive thing'.[134] He points out that, by contrast, it could be that 'coastal state territory was measured up to the median line, giving them full control over all activities within'.[135] This argument that the governance of the oceans needs to remain a shared competence is right and must continue to be defended. Indeed, the risk otherwise might be that coastal eventually begin to equate prescriptive jurisdiction with a sense of exclusive ownership over UCH therein, which clearly must be avoided. The difficulty, however, is the substantive meaning of an 'agreement to cooperate' which is at the heart of this system of sharing responsibility for the protection of UCH.

4. Challenges with International Cooperation and the UNESCO Convention

(a) An Agreement to Cooperate as an Agreement to Enter 'Good Faith Negotiations'

The first glaring difficulty with exploring the legal meaning of a duty to cooperate under international law is that the duty to *cooperate*, as a norm, also forms the entire 'bedrock' of international law itself.[136] Providing an erudite legal definition of international cooperation becomes a thankless task once it is abundantly clear that international 'cooperation' and 'law' are both so deeply enmeshed.[137] As Rayfuse notes, cooperation

[133] Supra n. 40, Forrest, at p. 544.
[134] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File.
[135] Ibid, Firth.
[136] Wouters, P., (2013), ''Dynamic Cooperation' in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters', 21(3) *Environmental Liability* 88-97, at p. 88. See Wolfrum R., 'International Law of Cooperation', in *Max Planck Encyclopedia of Public International Law* (at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?result=1; accessed 18 December 2018).
[137] E.g., United Nations, (1945), *Charter of the United Nations and Statute of the International Court of Justice*, 26 June 1945, San Francisco, 59 Stat. 1031, Arts. 1, 11, 13 and 55; For example, the UN Declaration on Principles of International Law includes the word 'co-operation' no less than 21 times (United Nations, (1970), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, Resolution Adopted by the General Assembly, Report from the Sixth Committee, 24 October 1970, UN Doc. A/RES/25/2625, United Nations (New York)); United Nations, (2005), *In Larger Freedom: Towards Development, Security and Human Rights for all, Report of the Secretary-General*, 21 March 2005, UN Doc. A/59/2005, at para. 18; The UN 'Our Shared Responsibility' report refers to the essential need for cooperation no less than 32 times (United Nations, (2004), *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats Challenges and Change*, 2 December 2004, UN Doc. A/59/565, United Nations (New York)); United Nations, (1966), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, adopted by General Assembly Resolution 2200A (XXI), United Nations (New York), Art. 2(1); United Nations, (1992), *Rio Declaration on Environment and Development*, 3-14 June 1992, Rio de Janeiro, UN Doc. A/CONF.151/26, United Nations (New York), Principle 27.

itself 'has its origins in the general principles of international law'.[138] While Englender et al once said how cooperation 'is a basic element in international relations'[139] and Bautista once that it formed 'the basis of all international law.'[140] Indeed, Robin Churchill once remarked how cooperation formed the very essence of the law of the sea, where the principle is 'deeply embedded' in the LOSC.[141] Certainly, he adds, 'one could say that co-operation is its leitmotiv, so frequently do its provisions call for co-operation between its parties in relation to a host of diverse matters.'[142]

It seems that it is in relation to governing shared environmental spaces and resources, such as lakes, rivers and seas, where the notion of a duty to cooperate, and what this could entail normatively speaking, has been explored in meaningful detail.[143] Even here, however, it would still be incredibly difficult to find a precise meaning, given that agreeing to cooperate is included 'in virtually all international environmental agreements.'[144] Indeed, there is no greater challenge for inter-state cooperation than that presented by climate change,[145] where the extent to which a duty to cooperate actually and legitimately 'encroaches upon state sovereignty remains firmly debated.'[146] Given

[138] Rayfuse, R., (2015), 'Regional Fisheries Management Organizations', in *The Oxford Handbook on the Law of the Sea*, D.R. Rothwell, A.G.O. Elferink, K.N. Scott and T. Stephens (Eds.), 439-462, Oxford University Press (Oxford), at p. 441.
[139] Englender, D., Kirschey, J., Stöfen, A. and Zink, A., (2014), 'Cooperation and Compliance Control in Areas Beyond National Jurisdiction', 49 *Marine Policy* 186-194, at p. 187.
[140] Bautista, L., (2013), 'Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law', in *Securing the Ocean for the Next Generation: Papers from a Law of the Sea Institute*, UC Berkeley-Korea Institute of Ocean Science and Technology Conference (May 2012, Seoul), H. Scheiber and M. Kwon (Eds.), Berkeley Law (Berkeley), (at: https://ro.uow.edu.au/cgi/viewcontent.cgi?article=2491&context=lhapapers; accessed 18 November 2018), at p. 29.
[141] Churchill, R., (2015), The LOSC Regime for the Protection of the Marine Environment: Fit for the Twenty-First Century?', in *Research Handbook on Marine Environmental Law*, R. Rayfuse (Ed.), 3-30, Edward Elgar (Cheltenham), at p. 12; Supra n. 139, Englender et al, at p. 188.
[142] Ibid, Churchill, at p. 12.
[143] Charlesworth, H., (2014), 'Separate opinion of Judge ad hoc Charlesworth', in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, ICJ Case No. 148, 231-237, in ICJ Reports (2014) 226-300, at para. 13.
[144] Sands, P., (2012), *Principles of International Environmental Law*, 2nd Edn, Cambridge University Press (Cambridge), at pp. 249-250; Voigt, C., (2015), 'Environmentally Sustainable Development and Peace: What Role for International Law?', in *Promoting Peace through International Law*, C.M. Bailliet and K.M. Larsen (Eds.), 168-190, Oxford University Press (Oxford), at p. 179; c.f., 'Considered together, this growing body of multilateral environmental treaties provides a corpus of substantive and procedural rules that elucidate the normative content and practice relevant to the duty to cooperate' (supra n. 136, Wouters, at p. 92); Englender et al also note how, despite this, the concept of cooperation, 'has never been defined by an international treaty or a resolution of an international organization' (supra n. 139, Englender et al, at p. 187).
[145] For example, the United Nations Framework Convention for Climate Change requires the 'widest possible cooperation by all countries and their participation in an effective and appropriate international response' (United Nations, (1992), *United Nations Framework Convention on Climate Change*, (9 May 1992, New York), FCCC/INFORMAL/84, Preamble).
[146] Supra n. 136, Wouters, at p. 91.

this ubiquity to contemporary international polity,[147] the precise legal meaning of a duty to cooperate has been under increasing theoretical examination.[148] In *Gabčíkovo-Nagymaros*, it was affirmed that international cooperation is a recognised duty in the management of international watercourses.[149] However, when drafting the original convention at the heart of the dispute, opinions differed considerably in the International Law Commission on whether such a duty could carry any real normative force.[150] One side of the debate argued that cooperation was 'not simply a lofty principle, but a legal duty.'[151] While others said merely that 'cooperation was a goal, a guideline for conduct, but not a strict legal obligation which, if violated, would entail international responsibility.'[152]

According to McCaffrey, the majority saw cooperation equivocally as an 'umbrella term, embracing a complex of more specific obligations which, by and large, do reflect customary international law.'[153] This perspective perhaps provides a clue: cooperation is only as normative as the *existing* general duty to cooperate one already expects under international law. Such a conclusion might raise significant doubt about whether it provides for any additional duties above the minimum baseline already extant within the legal framework. This perspective would also concur with the views of the ICJ in the *MOX Plant* case, where it was held that a duty to cooperate is *already* entrenched as 'a

[147] Supra n. 140, Bautista, at p. 29; Supra nn. 136-142.

[148] Zartman, I.W. and Touval, S., (2010), *International Cooperation: The Extents and Limits of International Cooperation*, Cambridge University Press (Cambridge), at pp. 2-3; 'The need for a world-wide system of public order – a comprehensive plan of cooperation – is fearfully urgent.' (Lasswell, H., (1963), *The Future of Political Science*, Aldine Transaction (Piscataway), at p. 24). See generally, Abbott, K.W. and Snidal, D., (2004), 'Pathways to International Cooperation', in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, E. Benvenisti and M. Hirsch (Eds.), 50-84, Cambridge University Press (Cambridge).

[149] *Case concerning the Gabčíkovo-Nagymaros project (Hungary/Slovakia)*, Judgment of 25 September 1997, International Court of Justice, ICJ Reports (1997) 7-84; Inter-state cooperation over water resources and shared watercourses has been where the substance and meaning of a duty to cooperate has been most explored and debated (Global Water Partnership, (2013), *International Law: Facilitating Transboundary Water Cooperation*, Policy Brief, August 2013, (at: https://www.gwp.org/globalassets/global/toolbox/publications/policy-briefs/14-international-law.-facilitating-transboundary-water-cooperation.pdf; accessed 18 December 2018), at p. 2-3).

[150] International Law Commission, (1987), 'Summary Records of the Meetings of the Thirty-Ninth Session, 4 May–17 July 1987', *Yearbook of the International Law Commission*, 1987, Vol. I, A/CN.4/SER.A/1987, at pp. 70-95; McIntyre, O., (2006), 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources', 46(1) *Natural Resources Journal* 157-210, at pp. 179-180.

[151] Ibid, International Law Commission, at p. 85.

[152] Ibid, International Law Commission, at p. 71.

[153] McCaffrey, S., (2001), *The Law of International Watercourses*, Oxford University Press (Oxford), at p. 401; '[T]he duty to cooperate was a kind of label for an entire range of obligations' (ibid, International Law Commission, at p. 75 (per Reuter); Leb, C., (2013), *Cooperation in the Law of Transboundary Water Resources*, Cambridge University Press (Cambridge), at p. 81.

fundamental principle under Part XII of [LOSC] and general international law'.[154] Taken to its furthest extent, therefore, this view might only equate failure to cooperate as being evidenced by regression into violent conflict or geopolitical tension, such as that witnessed between the UK and Iceland during the Cod Wars.[155]

In the *Lac Lanoux* case, noted above between France and Spain, it was held that such a duty entails 'an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements.'[156] Similarly, the *Pulp Mills* case translated a duty of cooperation simply as the 'procedural obligations of informing, notifying and negotiating'.[157] Despite recognising that, as under *North Sea Continental Shelf*, negotiations had to be carried out in good faith and a meaningful manner, the court did however stress that, in accordance with the *Railway Traffic* case, 'an obligation to negotiate does not imply an obligation to reach an agreement'.[158] Along similar lines, the *Icelandic Fisheries* case held that while the parties must seek an equitable solution, it should still be one which pays 'reasonable regard to the legal rights' of each party and is 'derived from the applicable law.'[159] In other words, there seems to be an inescapable conclusion that an international duty to cooperate probably does not require a great deal

[154] *The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures*, International Tribunal for the Law of the Sea, 3 December 2001, ITLOS Case No. 10, at para. 82.
[155] See, e.g., Welch, A., (2006), *The Royal Navy in The Cod Wars: Britain and Iceland in Conflict 1958-1976*, Maritime Books (Liskeard).
[156] Supra n. 130, Affaire du lac Lanoux, at p. 308.
[157] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, 20 April 2010, International Court of Justice, ICJ Reports (2010) 14, at para. 81.
[158] Ibid, Pulp Mills case, at para. 150; While the Permanent Court of Justice held that there is no obligation to come to an agreement, they did say the duty 'is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements.' (*Railway Traffic between Lithuania and Poland, (Railway Sector Landwarow-Kaisiadorys), Advisory Opinion*, 15 October 1931, Permanent Court of International Justice, Series A/B No. 42, 108-123, at p. 116).
[159] *Fisheries Jurisdiction Case, (United Kingdom of Great Britain and Ireland v. Iceland; Federal Republic of Germany v. Iceland)*, International Court of Justice, ICJ Reports (1973) 3-23 and 175-216, at pp. 192-193 and 202; For example, the Straits of Johor Land Reclamation case required that future disputes are 'resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement' (*Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Decision of the 1 September 2005, Reports of International Arbitral Awards, Volume XXVII 133-145, at p. 144).

more than a duty to take part in meaningful and good faith negotiations,[160] as was earlier suggested by Scovazzi in the context of UCH protection.[161]

(b) The Normative Substance of an Agreement to Engage in Good Faith Negotiations

Legal rules are only as effective as their normative elements, with clarity against which compliance can be accurately evaluated under the threat of sanction.[162] Both normatively and practically speaking, therefore, there are many issues with reliance upon an agreement to negotiate in good faith and with the circularity complex that it entails.[163] Many legal agreements contain wording to this effect, which have long been interpreted as requiring parties inter alia to 'engage in negotiations with a sincere desire to reach an agreement and . . . make an earnest effort to reach common ground.'[164] While some positive benefits can likely be drawn from such agreements,[165] there are also undoubtedly many latent defects.[166] It is immediately obvious that there is little normative clarity on when a party has acted in "bad faith". To what extreme can malevolence, recalcitrance, intransigence, indifference or imprudence be tolerated before mala fides can confidently be identified?[167]

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[160] 'In international environmental law, cooperation is thus a central principle in order to prevent disputes, to provide timely notification of plans to carry out or permit activities . . . and to engage in good faith consultations to arrive at a fair and equitable resolution of the situation' (supra n. 144, Voigt, at p. 180); Sands says that the duty to cooperate is 'translated into more specific commitments through techniques designed to ensure information sharing and participation in decision-making [including] rules on environmental impact assessment[s]...; rules on ensuring that neighbouring states receive necessary information (requiring information exchange, consultation and notification)…; the provision of emergency information…; and transboundary enforcement of environmental standards.' (Supra n. 144, Sands, at p. 250).

[161] Supra n. 87, at p. 122.

[162] Chiassoni, P., (2012), 'Defeasibility and Legal Indeterminacy', in *The Logic of Legal Requirements: Essays on Defeasibility*, J.F. Beltrán and G.B. Ratti (Eds.), 151-181, Oxford University Press (Oxford), at p. 181.

[163] Trakman, L.E. and Sharma, K., (2014), 'The Binding Force of Agreements to Negotiate in Good Faith', 73(3) *Cambridge Law Journal* 598-628, at pp. 603-604; Feinman, J.M., (1983), 'Critical Approaches to Contract Law', 30(4) *UCLA Law Review* 829-860, at p. 837.

[164] Cox, A., (1958), 'The Duty to Bargain in Good Faith', 71(8) *Harvard Law Review* 1401-1442, at p. 1416.

[165] Hylton, K.N., (1994), 'An Economic Theory of the Duty to Bargain', 83(1) *Georgetown Law Journal* 19-78; Burton, S.J., (1980), 'Breach of Contract and the Common Law Duty to Perform in Good Faith', 94(2) *Harvard Law Review* 369-404, at p. 393.

[166] Supra n. 163, Trakman and Sharma, at pp. 603-604; Colombo, S., (1993), 'Good Faith: The Law and Morality', 8 *Denning Law Journal* 23-60, at pp. 24-29; Wellens, K., (2014), *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis*, Routledge (Abingdon), at pp. 163-192.

[167] Lawrence, J.K.L., (2014), 'Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates', 29(1) *Ohio State Journal on Dispute Resolution* 35-58; Matthews, R.R., (1979), 'Talking Without Negotiating: The Case of Rhodesia', 35(1) *International Journal* 91-117; Barasnevicius Quagliato, P., (2008), 'The Duty to Negotiate in Good Faith', 50(5) *International Journal of Law and Management* 213-225. See, e.g., *Southern Bluefin Tuna, (New Zealand v. Japan, Australia v. Japan)*, (1999), 27 August 1999, International Tribunal for the Law of the Sea, ITLOS Case No. 3.

In all negotiations the parties' motives, underlying interests and factual positions will differ significantly,[168] all too often leading to impasse.[169] There may be distrust, reluctance to lose ground or face, or intensifying feelings of antagonism, resentment or entitlement.[170] These problems can be further intensified as a result of political or ideological tensions, such as in relations between former imperial powers and postcolonial states, as can be common with flag-coastal state disputes over UCH.[171] Contrasting cultural traditions and values may also antagonise efforts to come together in negotiations. All of these factors can exacerbate one another, meaning that parties in a negotiation may not get anywhere or, equally, may get further apart.[172] One only needs to witness the current political disputes over the rights to resources in the Arctic, to see how agreements between states to just "get along" can easily derail and enter into a downward spiral of increasing entrenchment and distrust.[173]

Having failed to cooperate, whether with the use of a third party neutral or not, states might eventually resort to impartial third parties, in the form of judicial or quasi-judicial arbiters, for a determination of who is the outright winner and loser. Such adjudicated outcomes not only curtail self-determination and the freedom of states to manage their individual needs more accurately and creatively,[174] but can resemble the cliché 'lose-lose' characterisation after the time, money, energy and emotions invested in pursuit of "victory".[175] Beyond formal dispute resolution, even in non-conflictual and non-

[168] Supra n. 121, Zhao, at p. 619; Supra n. 40, Forrest, at p. 544; Supra n. 93, Boesten, at p. 167.
[169] Murphy, T.H., (1977), 'Impasse and the Duty to Bargain in Good Faith', 39(1) *University of Pittsburgh Law Review* 1-62.
[170] Kennedy, K.A. and Pronin, E., (2012), 'Bias Perception and the Spiral of Conflict', in *Ideology, Psychology, and Law*, J. Hanson (Ed.), 410-446, Oxford University Press (Oxford); Fisher, R. and Shapiro, D., (2005), *Beyond Reason: Using Emotions as You Negotiate*, Viking Books (New York), at pp. 3-14; Shapiro, D., (2017), *Negotiating the Nonnegotiable: How to Resolve Your Most Emotionally Charged Conflicts*, Viking Books (New York), at pp. 3-25; Mnookin, R.H. and Ross., L., (2005), 'Introduction', in *Barriers to Conflict Resolution*, K. Arrow, R.H. Mnookin, L. Ross, A. Tversky and R. Wilson (Eds.), 2-25, WW Norton & Co (New York); Riskin, L.L., (2010), 'Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation', 10(2) *Nevada Law Journal* 289-337, at pp. 297-307.
[171] Dromgoole, S. (Ed.), (2006), *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, Martinus Nijhoff (Leiden), at pp. xxxvi-xxxvii.
[172] Supra n. 170, Kennedy and Pronin; Ross, L., (2005), 'Reactive Devaluation in Negotiation and Conflict Resolution', in *Barriers to Conflict Resolution*, K. Arrow, R.H. Mnookin, L. Ross, A. Tversky and R. Wilson (Eds.), 26-43, WW Norton & Co (New York); Lord, C.G., Ross, L. and Lepper, M.R., (1979), 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence', 37(11) *Journal of Personality and Social Psychology* 2098-2109.
[173] See e.g., Brosnan, I.G., Leschine, T.M. and Miles, E.L., (2011), 'Cooperation or Conflict in a Changing Arctic?', 42(1-2) *Ocean Development and International Law* 173-210.
[174] Churchill, R., (2006), 'Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R. Barnes and D. Ong (Eds), 388-416, Oxford University Press (Oxford), at p. 413.
[175] Bilder, R.B., (2007), 'Adjudication: International Arbitral Tribunals and Courts', in *Peacemaking in International Conflict: Methods and Techniques*, I.W. Zartman (Ed.), 195-226, United States Institute of

contentious negotiations, there is still a wanting of firmness in the call for cooperation which undermines its intended purpose. With all the initial intention of wanting to show goodwill, states will have their own interests, motivations, fears and entrenched positions.[176] There may be deleterious power differentials,[177] cultural plurality advantaging one state over another,[178] information asymmetry,[179] an uneven allocation of resources and expertise,[180] and a pervasively harmful force of distrust and a perception of inequity. Ultimately, *effective* negotiation requires far more than an agreement to negotiate *effectively*.[181] Although, indubitably, it is a valuable first step.

Analysing the ICJ judgment in the *Lac Lanoux* case, McIntyre informs us that good faith negotiations would likely be breached 'where one party terminates the negotiations without justification, imposes abnormal delays or time limits, fails to adhere to the agreed

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Peace (Washington), at pp. 216-218; Fenn, P., 'Conflict Management and Dispute Resolution', in *Commercial Management of Projects: Defining the Discipline*, D. Lowe and R. Leiringer (Eds.), 234-269, Wiley-Blackwell (Hoboken); Eaton, J.W. and Eaton, D.J., (1996), 'Negotiation Strategies in Transboundary Water Disputes', in *Transboundary Water Resources Management: Institutional and Engineering Approaches*, J. Ganoulis, L. Duckstein, P. Literathy and I. Bogardi (Eds.), 37-45, Springer (New York); Nagel, S.S. (Ed.), (2001), *Resolving International Disputes Through Super-Optimum Solutions*, Nova Science Publishers (New York).

[176] See generally, Odell, J.S. and Tingley, D., (2013), 'Negotiating Agreements in International Relations', in *Negotiating Agreement in Politics*, Task Force Report, J. Mansbridge and J.C. Martin (Eds.), 144-182, American Political Science Foundation (Washington), (at: https://scholar.harvard.edu/files/dtingley/files/negotiating_agreement_in_politics.pdf; accessed 18 December 2018); Odell, J., (2012), 'Negotiation and Bargaining', in *Handbook of International Relations*, 2nd Edn, W. Carlsnaes, T. Risse and B.A. Simmons (Eds.), 379-400, Sage Publications (Los Angeles).

[177] Dinar, S., (2009), 'Power Asymmetry and Negotiations in International River Basins', 14(2) *International Negotiation* 329-360; Habeeb, W.M., (1988), *Power and Tactics in International Negotiation: How Weak Nations Bargain with Strong Nations*, Johns Hopkins University Press (Baltimore); Pfetsch F.R. and Landau, A., (2000), 'Symmetry and Asymmetry in International Negotiations', 5(1) *International Negotiation* 21-42, at pp. 27-32; Daoudy, M., (2009), 'Asymmetric Power: Negotiating Water in the Euphrates and Tigris', 14(2) *International Negotiation* 361-391; Adler, R.S. and Silverstein, E.M., (2000), 'When David Meets Goliath: Dealing with Power Differentials in Negotiations', 5 *Harvard Negotiation Law Review* 1-21.

[178] Supra n. 176, Odell and Tingley, at pp. 152-153; Bartos, O.J., (1967), 'How Predictable are Negotiations?', 11(4) *Journal of Conflict Resolution* 481-496, at pp. 485-486; See generally, Gelfand, M. and Brett, J. (Eds.), (2004), *The Handbook of Negotiation and Culture*, Stanford Business Books (Palo Alto).

[179] Rauchhaus, R.W., (2006), 'Asymmetric Information, Mediation, and Conflict Management', 58(2) *World Politics* 207-241; O'Brien, R.C. and Helleiner, G.K., (1980), 'The Political Economy of Information in a Changing International Economic Order', 34(4) *International Organization* 445-470; Schei, V. and Rognes, J.K., (2003), 'Knowing Me, Knowing You: Own Orientation and Information About the Opponent's Orientation in Negotiation', 14(1) *International Journal of Conflict Management* 43-59.

[180] Fuentes-Albero, C. and Rubio, S.J., (2010), 'Can International Environmental Cooperation Be Bought?', 202(1) *European Journal of Operational Research* 255-264; Supra n. 176, Odell and Tingley, at pp. 153-154; Morgenthau, H.J., (2005), *Politics Among Nations: The Struggle for Power and Peace*, 5th Edn, (Revised by K.W. Thompson and D. Clinton), McGraw-Hill Education (New York), at pp. 124–179; Zartman, I.W., (1985), 'Negotiating from Asymmetry: The North-South Stalemate', 1(2) *Negotiation Journal* 121-138.

[181] '[T]he existence of an international agreement, even one with which participating states regularly comply, does not necessarily mean that those states have accepted substantively significant commitments' (supra n. 148, Abbot and Snidal, at p. 52); Supra nn. 163-173.

procedure, or systematically refuses to consider the proposals or the interests of the other party.'[182] Requiring refusal of reasonable proposals to be *systematic* before a breach of duty is found suggests a very high threshold.[183] On this narrow perspective, states may be "cooperating" even if negotiating with a pure focus on their own interests and on the acquisition of a better individual outcome, while engaging in a zero or negative sum game with their *opponents*. Given the historic role that power and political posturing play in the law of the sea, such self-interested approaches to negotiation could still be justifiably pursued with all good faith.[184] Scovazzi confirms this minimalist definition of the duty when he suggests that states will only fall foul of it when '*persistently* disregard[ing] any request by other States to negotiate'.[185] However, given that the UNESCO Convention already requires member states to consult one another and to engage in meaningful negotiations, the cooperation duty perhaps adds little more beyond a hortatory agreement to pay due regard to the interests of others,[186] engage in minimal standards of 'good neighbourliness',[187] and act within the bounds of 'good faith', i.e., the mere avoidance of *bad* faith. Yet, indeed, such principles are the very foundational elements of international legal order itself and only require that the door be open to "listening" to opposing views.

Some authors have therefore tried to argue in favour of an 'evolutionary interpretation' of the duty to cooperate, in order to bring broader principles – such as sustainable development, precautionary management, integrated planning, and the polluter pays

[182] Supra n. 150, McIntyre, at p. 186; Supra n. 130, Affaire du lac Lanoux, at p. 307.
[183] Oude Elferink similarly interprets the 'good faith negotiation' obligation in the North Sea Continental Shelf case as likely to be breached 'when either [party] insists upon its own position without contemplating any modification of it' (Oude Elferink, A.G., (2013), 'North Sea Continental Shelf Cases', in *Max Planck Encyclopedia of Public International Law*, R. Wolfrum (Ed.), Oxford University Press (Oxford), (at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e180?prd=EPIL; accessed 18 December 2018), at para. 10).
[184] Nordquist, M.H., Rosenne , S. and Sohn, L.B. (Eds.), (1985), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume I, Martinus Nijhoff (Leiden), at p. 45; Hutchinson, C., (2006), 'The Duty to Negotiate International Environmental Disputes in Good Faith', 2(2) *McGill International Journal of Sustainable Development Law and Policy* 117-154, at pp. 150-151.
[185] Scovazzi, T., (2009), 'Underwater Cultural Heritage', in *Max Planck Encyclopedia of Public International Law*, R. Wolfrum (Ed.), Oxford University Press (Oxford), (at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1232?rskey=iSs11N&result=1&prd=EPIL; accessed 18 December 2018), at para. 6 (emphasis added); The ICJ has even characterised a 'dispute' itself as being 'inferred from the failure of a State to respond to a claim in circumstances when a response is called for', thus confirming the difficulty of identifying when "disputes" become "non-cooperation" (*Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, Judgment of 1 April 2011, International Court of Justice, ICJ Reports (2011) 70-141, at para. 30).
[186] Supra n. 30, Harrison, at pp. 28 and 31.
[187] 'Cooperation between states flows from the principle of 'good-neighbourliness' as included in Article 74 of the UN Charter.' (Supra n. 144, Voigt, at p. 179).

principle – within the general obligations of states.[188] It could be argued that these wider values and principles could influence negotiations from the "shadows".[189] However, this is questionable. The very problem with the duty to cooperate, as shown above, is its inimicality to the absorption of meaningful substance.[190] Furthermore, while these environmental principles are positive aspirations and idealistic constitutional objectives, they are effectively a separate body of norms sought outside of the "duty" to cooperate, with their own challenges of enforcement and ambiguity. It is also possible to see a number of areas where the duty to pay due regard has expanded to practical matters such as requiring the exchange of information, notification, and consultation.[191] Nevertheless, importantly, it does not mandate participation in internal decision-making, but merely the need to show one has listened to the interests of others.

In other words, we are yet to reach a system of international law built upon international 'cooperation' rather than 'co-existence' as sought by Friedmann in 1964.[192] This uninspired view of the duty to cooperate was confirmed in the recent *Whaling case* judgment in 2014.[193] Here the ICJ, according to Young and Sullivan, 'was modest in its exposition of the duty to cooperate. Rather than pronounce upon the nature of modern international law, or refer to similar concepts in other treaties or case law, or a "good faith" standard, it tied the source of the duty to cooperate to the provisions and procedures of the [International Convention for the Regulation of Whaling].'[194] In other words, it maintained an uninspiring and positivist view, assigning cooperation obligations only based on the prior consent of states. Such meagre duties to pay 'due regard' to established international principles or to the interests of other states, as elucidated in all these cases,[195] would not on any of these accounts, create a *positive* duty on the part of states to pre-empt

[188] Supra n. 184, Hutchinson, at pp. 128-129; Young, M.A. and Sullivan, S.R., (2015), 'Evolution Through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice', 16(2) *Melbourne Journal of International Law* 311-343.
[189] Dajani, O.M., (2007), 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks', 32(1) *Yale Journal of International Law* 61-124; Madoff, R.D., (2002), 'Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution', 76(1) *Southern California Law Review* 161-187, at pp. 167-169; Houghton, K., (2014), 'Identifying New Pathways to Ocean Governance: The Role of Legal Principles in Areas Beyond National Jurisdiction', 49 *Marine Policy* 118-126, at p. 122.
[190] See also Chapter 4, Section 2.
[191] Miles, E.L. and Burke, W.L., (1989), 'Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising From New Fisheries Conflicts: The Problem of Straddling Stocks', 20(4) *Ocean Development and International Law* 343-357, at p. 351; Supra n. 144, Voigt, at pp. 179-180.
[192] Friedmann, W., (1964), *The Changing Structure of International Law*, Steven & Sons (London).
[193] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, International Court of Justice, Case No. 148, ICJ Reports (2014) 226-300.
[194] Supra n. 188, Young and Sullivan, at p. 332.
[195] With regard to the same in the Whaling Case, see ibid, Young and Sullivan, at pp. 340-341.

and actively address potential threats to UCH, but merely resolve international conflicts as they arise.

(c) The Need for a Duty of 'Active' – not 'Passive' – Cooperation

In 2015, Voigt described the present duty of cooperation as a 'central principle in order to prevent disputes',[196] merely implying that the law as it stands is about dealing with where interests collide in international affairs, rather than about forward-thinking and creatively problem-solving collective action challenges. As explored in Chapter 4, the protection of global public goods such as the natural and marine environment requires more than merely agreeing to listen with open minds. Conca and Dabelko, for example, refer to the need for greater trust, reciprocity, transparency, cooperative knowledge, and shared responsibility.[197] Ideally, therefore, states should be required to engage in a positive sum approach ('win-win'), to energetically seek resolution to the issue by *actively considering all options*, and to *positively pre-empt the underlying interests* of other states and the international community.[198] This concurs with Zartman and Touval's perspective that cooperation should be 'more than simply the opposite or absence of conflict', but rather a 'conscious, specific, positive action.'[199]

In the context of UCH protection, however, the system of cooperation as it currently stands under the UNESCO Convention does not appear to entail such an 'active' duty – such as compelling states to engage in further multilateral treatymaking and integrative processes in order to protect UCH – but a merely 'passive' duty, requiring that states only listen when a formal complaint is made that legal rights have been breached, usually after-the-event. As highlighted, Scovazzi accurately summarises the duty as merely requiring that states 'take into account' the interests of others and do not 'persistently reject' requests for cooperation.[200] Furthermore, while destruction of UCH could entail an

[196] Supra n. 144, Voigt, at p. 180.
[197] Conca, K., (2002), 'The Case for Environmental Peacemaking', in *Environmental Peacemaking*, K. Conca and G.D. Dabelko (Eds.), 1-22, John Hopkins University Press (Baltimore), at p. 11; Judge Wolfrum and Judge Kateka suggested that the UK had not acted in good faith in the Chagos Marine Reserve Case, given that '[t]rust and confidence are inherent in international cooperation' ('Dissenting and Concurring Opinion, Judge James Kateka and Judge Rüdiger Wolfrum', in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, 18 March 2015, Permanent Court of Arbitration, ICGJ 486 (PCA 2015), at para. 90).
[198] Supra n. 184, Hutchinson, at p. 153; Supra n. 153, Leb, at p. 85; Supra n. 150, McIntyre, at p. 189ff; Benvenisti, E., (2013), 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *American Journal of International Law* 295-333, at p. 300.
[199] Supra n. 148, Zartman and Touval, at p. 1.
[200] Scovazzi, T., (2014), 'Underwater Cultural Heritage as an International Common Good', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 215-230, Hart (Oxford), at p. 219.

internationally wrongful act,[201] it would be a duty which only emerges post-destruction and would require a burdensome level of evidence of activity which is knowing or intentionally reckless.

In other words, the UNESCO Convention has not created a positive normative obligation for states to engage in active protection of UCH from incidental, accidental, potential or illegal threats. Instead, it reiterates an empty agreement between flag and non-flag states to just "get along" in the shared ocean space, without a clear methodological mechanism for filling in this crucial normative void. Such an unpredictable system carries considerable defects, both in terms of compliance and enforceability,[202] as well as in terms of gaping substantive regulatory gaps.[203] Instead, it must rely upon abstruse general principles, vague customary rules, unenforceable and gap-ridden soft law, and ex post multilateral and bilateral agreements, to unpredictably and spasmodically bridge conflicting issues. The result will be that the other principles which buttress the UNESCO Convention – including in situ preservation, seeing UCH as a public good, recognising broader cultural or historical claims of interest in UCH sites from other communities, and acting in the benefit of humanity – are required to play an enhanced guiding role in international future bilateral and multilateral interactions, as they gradually improve in the coming decades, while UCH continues to be damaged or destroyed.

This can perhaps be evidenced by the manner in which the principle-led Rules in the Annex have been adopted by states willingly, but the terms developed for achieving effective 'cooperation' throughout the main articles have received more resistance.[204] Importantly, however, while such broad *principles* buttressing the Convention may assist in setting some boundaries for substantive norm development, they do not yet legally assure acceptance of responsibility, state compliance or, critically, a *positive responsibility* towards the international community. As Judge Weeramantry once said in

[201] Ibid.
[202] E.g., Chinkin, C.M., (1989), 'The Challenge of Soft Law: Development and Change in International Law', 38(4) *International and Comparative Law Quarterly* 850-866; Franck, T.M., (1988), 'Legitimacy in the International System', 88(4) *American Journal of International Law* 705-759, 713-714; Cogan, J.K., (2006), 'Noncompliance and the International Rule of Law', 31(1) *Yale Journal of International Law* 189-210, at pp. 195-202.
[203] E.g., Weil, P., (1983), 'Towards Relative Normativity in International Law', 77(3) *American Journal of International Law* 413-442; Bassiouni, M.C., (1990), 'A Functional Approach to "General Principles of International Law"', 11(3) *Michigan Journal of International Law* 768-818, at pp. 817-818; Ben-Shahar, O., (2009), 'A Bargaining Power Theory of Default Rules', 109(2) *Columbia Law Review* 396-430, at pp. 413-414; Kammerhofer, J., (2004), 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15(3) *European Journal of International Law* 523-553.
[204] See Chapter 1, Section 4 and infra Sections 1 to 3.

a statement receiving widespread approval, what is now needed to achieve sustainable justice is:

> 'not merely *passive* cooperation, but rather *active* cooperation. If we are to save our global inheritance, we must do so actively. We need, for this purpose, to be willing to surrender some part of sovereignty to the rest of the world, accepting common guidance by the global community.'[205]

In other words, agreements to "cooperate" over common maritime challenges should be understood for what they are: an admission that more detailed and transnational systems of collaboration, coordination, integration and harmonisation between stakeholders are needed. This is no doubt what was foreseen in LOSC Article 303(4) and the UNESCO Convention Article 6 which both make it clear that states are expected to engage in negotiations towards *further* bilateral and multilateral arrangements which provide for *better* protection of UCH.[206] This also seems to be what the duty of cooperation in the UNESCO Convention was intended to cover.[207] Put another way, and as the following subsection illustrates, the general commitment to cooperate in the protection of UCH under LOSC Article 303(3) is of little bearing in isolation: what matters is the ensuing decades dedicated to the development of multi-level regimes which address the protection of UCH.

(d) Active Cooperation as Another Word for Ongoing Regime-Building

This need for marine cooperation to translate into the expansion of regimes, or the thickening of their power and complexity, can perhaps be best illustrated by the increasingly *active* forms of cooperation necessitated in the protection of marine living resources, particularly, fisheries. Here, again, the meaning of duties towards cross-border "cooperation" have been debated at length. For example, a recent UN report on regional fisheries management organisations (RFMOs) noted the 'broader issue undermining the sustainability of high seas fisheries is the absence of a consensus on the nature of the duty to cooperate'.[208] In reference to the challenge of protecting marine living resources, Takei

[205] Weeramantry, H.E. Judge C.G., (2017), 'Achieving Sustainable Justice Through International Law', in *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012*, M.C. Segger and H.E. Judge C.E. Weeramantry (Eds.), 109-124, Routledge (Abingdon), at p. 120 (emphasis added).
[206] See Chapter 7.
[207] Supra n. 64, González, O'Keefe and Williams, at p. 60 (per O'Keefe).
[208] United Nations, (2005), *Oceans and the Law of the Sea, Report of the Secretary-General*, (4 March 2005), United Nations General Assembly, 60th Session, UN Doc. A/60/63, at para. 211.

also said that cooperation is an 'essential element' which means very little until it is fleshed out.[209] He then highlighted how, as a standalone commitment, '[i]t is not clear: (1) which states are required to cooperate; (2) which states are entitled to require cooperation from other states; (3) what form cooperation needs to take.'[210] As Guilfoyle says, it is 'an obligation so diffuse that it is difficult to see how one individual state is directly injured by another state's individual (or even repeated) breach of it. Indeed, there is significant scope for disagreement as to what might constitute a 'breach' of an obligation to co-operate in the first place.'[211] As Henriksen et al acknowledge, exploration into the meaning of the duty to cooperate in the case of fisheries is 'not surprising, considering the problems of compliance with this obligation.'[212]

Any perusal of the concept in the fisheries context, however, makes it clear that such widespread agreements to cooperate – as began appearing in early multilateral conventions, such as the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas[213] or 1959 North-East Atlantic Fisheries Convention[214] – have made little difference in and of themselves. Rather, the vital factor in the sustainable protection of marine living resources has mostly been made by the *ongoing* and *proactive* multilateral treatymaking, soft law development, and multi-level regime-building which provide for detailed stakeholder coordination, rules for shared stock management, and regulatory harmonisation. Indeed, most have rightly argued that the duties to cooperate in the protection of the environment within the LOSC place an obligation upon states to subsequently establish and integrate activities through regional regimes.[215]

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[209] Takei, Y., (2013), *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems*, Martinus Nijhoff (Leiden), at pp. 56 and 256.
[210] Ibid, at p. 57.
[211] Supra n. 99, Guilfoyle, at p. 166.
[212] Henriksen, T., Hønneland, G., and Sydnes, A., (2005), *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, Martinus Nijhoff (Leiden), at p. 18.
[213] 'Considering . . . the nature of the problems involved in the conservation of the living resources of the high seas . . . there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation' (United Nations Convention on Fishing and Conservation of the Living Resources of the High Seas, (adopted 29 April 1958, in force 20 March 1966), 559 UNTS 285, Preamble).
[214] North-East Atlantic Fisheries Convention, (adopted 24 January 1959 (London), in force 27 June 1963), Treaty Series No. 28 (1963).
[215] Supra n. 209, Takei, at pp. 58 and 62; Supra n. 212, Henriksen, Hønneland and Sydnes, at pp. 15-18; Supra n. 138, Rayfuse, at p. 441; c.f., Applebaum and Donohue, by contrast, have suggested that states are pretty much free to choose how to effect the cooperation called for under the LOSC (Applebaum, B. and Donohue, A., (1999), 'The Role of Regional Fisheries Management Organizations', in *Developments in International Fisheries Law*, E. Hey (Ed.), 217-250, Kluwer Law International (The Hague), at p. 220); Supra n. 28, Orrego Vicuña, at pp. 200-266; Supra n. 98, Beckman and Davenport, at p. 32; Supra n. 99, Guilfoyle, at p. 167.

Such intensification of cross-border rules for cooperation has been particularly visible in regional or sea basin contexts, where the demands of shared utilisation of a common ecosystem have strengthened the political motivation to *meaningfully cooperate*, rather than *co-exist*.[216] This led to the proliferation of numerous global, regional and local accords, agreements and regimes which initially covered issues such as maximum quota allocations, harmonised conservation standards, and common frameworks for cross-border cooperation and enforcement. For example, since the 1970s, RFMOs have introduced a long list of practical mechanisms to address overfishing and non-compliance, including 'positive and/or negative lists of [authorised/unauthorised] vessels […], transhipment bans, the use of observers, port State controls, catch documentation schemes, and at-sea measures'.[217]

Yet further – with an intriguing analogy to the UNESCO Convention's intention to flesh out the meaning of the hollow duty to cooperate under LOSC Article 303(1) – the UN 1995 Fish Stocks Agreement was introduced to close the 'legal loophole' created by the near-empty meaning of commitments to cooperate within the LOSC.[218] It therefore went even further in the thickening of inter-state obligations by elaborating many detailed rules of cooperation, including technical rules on quota allocation, shared surveillance, data exchange, non-flag state enforcement, rules for cross-border enforcement, port-state measures, non-flag state jurisdiction, rules on inspection and interdiction, and strengthening the power and function of RFMOs themselves.[219] There has also been the provision of numerous compacts, regulations and soft law agreements, such as those propounded by the FAO, OECD and UN,[220] as well as a growing number of cross-border

[216] See Chapter 5 at Section 4 and Chapter 6.
[217] Supra n. 138, Rayfuse, at p. 453.
[218] Supra n. 28, Orrego Vicuña, at p. 201; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (8 September 1995), United Nations, UN Doc. A/CONF.164/37.
[219] Ibid.
[220] E.g., Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, approved on 24 November 1993 by Resolution 15/93 of the Twenty-Seventh Session of the FAO Conference, Food and Agricultural Organisation (Rome); FAO, (1995), *Code of Conduct for Responsible Fisheries*, Food and Agricultural Organization (Rome), (at: http://www.fao.org/3/a-v9878e.htm; accessed 18 December 2018); FAO, (2001), *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Food and Agricultural Organization (Rome), (at: http://www.fao.org/3/a-y1224e.pdf; accessed 18 December 2018); FAO, (2015), *Voluntary Guidelines for Flag State Performance*, Food and Agricultural Organization (Rome), (at: http://www.fao.org/3/a-i4577t.pdf; accessed 18 December 2018); FAO, (2009), *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Food and Agricultural Organization (Rome), (at: http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf; accessed 18 December 2018); OECD, (2009), *Strengthening Regional Fisheries Management Organisations*, Organisation for Economic Co-operation and Development (Paris); Lodge, M.W.,

processes which fully integrate stakeholders and communities into the system of governance, such as the provision of Advisory Councils across the EU,[221] the dissemination of numerous industry codes of practice, and the facilitation of co-management and marine spatial planning projects and pilots across the world.

The EU has also played a highly proactive rule in this transnational issue area, mandating the coordination and provision of spatial planning across EU waters through directives,[222] a prohibition on bottom trawling in certain areas,[223] as well as numerous instruments aimed at addressing illegal, unreported and unregulated fishing.[224] The EU's Common Fisheries Policy has regulated multitudinous technical and harmonisation matters with effective use of sovereignty-constraining supranational law, including fleet management, quota allocations, equipment standards, research, health and safety policy, port and sea inspections, aquaculture management, seafood quality assurance, and internal and external trade.[225] A number of global, regional and national epistemic bodies and communities also play an active role in protecting marine living resources, providing vital scientific data, guiding decision-making, analysing ecosystem vitality, and monitoring the actions of the maritime community. Most importantly, all of these processes are continuing to intensify in their inevitable march towards common rules, cross-border

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Anderson D., Løbach, T., Munro, G., Sainsbury, K. and Willock, A., (2007), *Recommended Best Practices for Regional Fisheries Management Organizations*, The Royal Institute of International Affairs (London), (at: https://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf; accessed 18 December 2018); United Nations, (2012), *The Oceans Compact: Healthy Oceans for Prosperity, An Initiative of the United Nations Secretary-General*, United Nations (New York), (at: http://www.un.org/depts/los/ocean_compact/SGs%20OCEAN%20COMPACT%202012-EN-low%20res.pdf; accessed 18 December 2018).

[221] European Commission, 'Advisory Councils', (at: https://ec.europa.eu/fisheries/partners/advisory-councils_en; accessed 18 December 2018).

[222] E.g., Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning, 257 *Official Journal of the European Union* 135-145; Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), 164 *Official Journal of the European Union* 19-40.

[223] Commission Delegated Regulation (EU) 2017/117 of 5 September 2016 establishing fisheries conservation measures for the protection of the marine environment in the Baltic Sea and repealing Delegated Regulation (EU) 2015/1778, C/2016/5562, 19 *Official Journal of the European Union* 1-9; Commission Delegated Regulation (EU) 2017/118 of 5 September 2016 establishing fisheries conservation measures for the protection of the marine environment in the North Sea, C/2016/5549, 19 *Official Journal of the European Union* 10-25.

[224] E.g., Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 286 *Official Journal of the European Union* 1-32; Commission No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 280 *Official Journal of the European Union* 5-41; Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, 343 *Official Journal of the European Union* 1-50.

[225] See European Commission, 'The EU's Fisheries Control System', (at: https://ec.europa.eu/fisheries/cfp/control_en; accessed 20 December 2018).

restraint and transnational standardisation. Indeed, the sense of lost 'national sovereignty' over the rules for conserving and managing fish stocks was an important factor in the UK's 2016 Brexit Referendum result, despite it seeming unlikely that the use of common rulebooks can be avoided if interests in shared ecosystems are to be in any way managed sustainably.[226]

As many have intimated and has been demonstrated very clearly in the fisheries context, the duty to cooperate in the context of marine living resources is thus a duty incumbent on coastal states to actively participate in further efforts towards regime-building and strengthening.[227] By comparison, the mere *agreement to agree* in Article 2(2) with the UNESCO Convention, and further brief and hortatory commitments to seize illicit UCH at ports,[228] share general information,[229] and report new discoveries of UCH to other states parties,[230] lack so much detail and substance as to border on meaningless. As Chapters 4 and 5 explore, therefore, the consent-based nature of international law also weakens the implementation and enforcement of such hortatory rules. Instead, such rules should ideally be fleshed out in greater and more substantive detail, rather than just drafting highly general and hortatory objectives for states to self-implement. This would include a constraint upon the freedom of states to only acknowledge outside interests in very narrow circumstances, as well as developing the true integration and empowerment of all stakeholders in the regime. It is precisely this kind of cooperation – a detailed and active form of cooperation which takes place across multiple levels and which integrates multiple state and non-state actors – which this study seeks to examine in the context of UCH protection.

5. Conclusion: The Need for 'Active' Cooperation in the Protection of Underwater Cultural Heritage

In March 2018, nearly a decade after the UNESCO Convention came into force, Italy formally notified the UNESCO Secretariat and MOP of their intention to protect the

[226] Phillipson, J. and Symes, D., (2018), ''A Sea of Troubles': Brexit and the Fisheries Question', 90 *Marine Policy* 168-173; McAngus, C., Huggins, C., Connolly, J. and van der Zwet, A., (2018), 'The Politics and Governance of UK Fisheries after Brexit', 9(3) *Political Insight* 8-11; Millard, A., (2017), 'The European Union's Common Fisheries Policy and the Implications of Brexit', 1(2) *Journal of Global and Area Studies* 45-64.
[227] Supra n. 209, Takei, at pp. 56 and 257; Supra n. 28, Orrego Vicuña, at pp. 203-205.
[228] Supra n. 1, UNESCO Convention, Arts. 14, 15 and 18.
[229] Supra n. 1, UNESCO Convention, Art. 19.
[230] Supra n. 1, UNESCO Convention, Arts. 9 and 11.

Skerki Banks through the Convention's cooperation framework.[231] As Guérin relayed in interview, this is a significant and important moment for the UNESCO Convention, being the first time that UNESCO has been notified under the procedures of Articles 7-12 and that the Coordinating State system is put into action.[232] It could even serve as a model of instituted multilateral cooperation over a specific site, in parallel with international efforts to develop a new instrument under the UN Convention on the Law of the Sea for protecting biodiversity beyond national jurisdiction.[233]

In such occasional cases, relating to the investment by coastal states into protective activities over specific and known sites, in which states with a verifiable link can lodge their interest in the UCH and ask to play a part in its subsequent protection, it is possible that the UNESCO Convention is a potentially useful framework for initially setting up the coordination between 'linked' states. This also includes the new rules which permit coordinating states to authorise activities and provide necessary permissions.[234] Unfortunately, however, such formal declarations of new protective activities directed at specific UCH assets in offshore environment are likely to be a rare occurrence. As noted in Chapter 2, the real threat to UCH no longer comes from legally-sanctioned salvage or archaeological research, but from incidental damage from unrelated economic activities or from illicit activities, where the vast majority of UCH sites are either unknown or generally under-protected. The question therefore really becomes what the new cooperation system developed through the UNESCO Convention adds, particularly in terms of addressing the legal vacuum of UCH placed upon the continental shelf.[235] One can certainly question whether Article 10, which deals with the rights of coastal states in this zone, 'is a potentially powerful provision',[236] representing an 'innovative expansion' of their rights, as was once ambitiously stated by O'Keefe.[237]

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[231] UNESCO, (2018), 'First Cultural Heritage Site to be Protected in International Waters', 16 March 2018, (at: http://www.unesco.org/new/en/culture/themes/single-view/news/first_cultural_heritage_site_to_be_protected_in_internationa/; accessed 18 December 2018).
[232] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File.
[233] United Nations Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, convened under UN General Assembly Resolution 72/249, 24 September 2017, UN Doc. A/RES/72/249.
[234] Supra n. 79, Martin.
[235] Supra n. 63, Dromgoole, at p. 370; The Dutch Advisory Committee on Issues of Public International Law concluded that even if interpretations of the UNESCO Convention were taken that were incompatible with the LOSC, they would represent 'only a minor shift' in the distribution of competences between coastal and flag states (supra n. 105, Netherlands Advisory Committee on Issues of Public International Law, at pp. 8 and 10).
[236] Supra n. 63, Dromgoole, at p. 290.
[237] Supra n. 140, Bautista, at p. 19; Supra n. 63, Dromgoole, at p. 157-158.

Although the UNESCO Convention provides that coastal states can coordinate the negotiation of multilateral regimes towards the protection of UCH in their EEZs or continental shelves,[238] there was of course nothing in the existing LOSC system prohibiting this. In fact, most sections throughout the LOSC explicitly encourage the development of bilateral and multilateral treaties on all matters requiring cooperation and coordination. Further, the jurisdictionalisation of the EEZ and continental shelf for the purposes of UCH management and research is occurring gradually through coastal state practice anyway, long before the UNESCO Convention came into force.[239] In this sense, the Convention actually placed some meaningful and practical limitations upon this encroaching coastal state regulation of UCH and, as such – on the basis that it could place firm limits on the extent to which coastal states can direct activities at UCH on their continental shelves unilaterally – its ratification should be *more*, and not *less*, attractive to maritime nations.

In the alternative, it is the development of rules and laws designed to *pre-emptively* protect sites from wide-ranging threats in shared ocean spaces where the need for effective cooperation is most prevalent.[240] Yet, while there has been the development of industry codes and some small-scale planning activities which might have assisted the protection of UCH in the cross-border context,[241] the awareness of marine historic heritage among maritime stakeholders, and the level of 'active' cooperation towards its protection, pales in comparison to the multi-level regime-building and continuous regulatory integration which has taken place in the context of economic interests, such as fisheries. Even in this world, however, fish stocks continue to dwindle towards unsustainable collapses or near-extinction. As Ardron et al recently remarked, cooperation on overfishing continues to be the 'Achilles heel of the existing constellation of agreements.'[242]

There are many new rules of actual substance which will be needed to properly address the protection of incidentally threatened UCH, beyond states merely inviting a few 'linked' states together to cooperate over a specifically threatened site. For example,

[238] Supra n. 1, UNESCO Convention, Art. 10.
[239] Supra nn. 50-60.
[240] '[T]he biggest challenge for the future is likely to be dealing with inadvertent damage or destruction to the UCH from human activities' (supra n. 108, Dromgoole, at p. 314).
[241] See Chapter 2, Section 2.
[242] Ardron, J.A., Rayfuse, R. Gjerde, K. and Warner, R., (2014), 'The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can be Achieved Using Existing International Agreements?', 49 *Marine Policy* 98-108, at p. 106.

meaningful rules might include: introducing bans on bottom trawling; creating large no-fishing zones; rules on the inspection of goods and the seizure of artefacts or the bailing of vessels and crew in port; schemes to permit the interception and even the boarding and inspection of vessels suspected of looting; rules on security cooperation and exchange of data; expediting the repatriation of UCH property between states; research cooperation; banning development or construction in certain zones; rerouting maritime traffic or relocating economic activities; putting in place archaeological protection zones; pooling maritime surveillance technology and policing resources; increasing transparency and empowerment of stakeholders in planning processes; developing common rules for monitoring project planning; incentivising agencies to disseminate best practices; and developing rules for cross-border arrest warrants and criminal enforcement; and so on.

These represent just a few examples of important, yet undeveloped and highly contested, legal rules needed to mediate between the diverse interests of transnational marine stakeholders impacted by UCH management. Importantly, however, none of these will be effectively resolved by the systems of *passive* cooperation which have been interpreted as the duties foreseen under the UNESCO Convention or the LOSC. As Risvas put it, even though 'one of the primary objectives of the UNESCO Convention was to create a legal framework of cooperation by fleshing out LOSC Article 303(1), this effort has not been crowned with success.'[243] In other words, the system of cooperation created 'could not escape the always troubled waters of the Law of the Sea'[244] and, in essence, preserves the sovereign autonomy of states to act independently of others and to engage in open-minded discussions only *after* their co-existing interests happen to have collided. As O'Keefe confirms with regard to UCH in 2014, therefore, '[t]o date there have been no significant disputes between States concerning underwater cultural heritage'.[245] This is despite the fact that the world's UCH continues to be demolished, bulldozed, looted and polluted.

Unfortunately, therefore, while O'Keefe makes an admirable effort to suggest that Article 5 in the UNESCO Convention, dealing with incidental threats beyond salvage and archaeological projects, is an 'imperative' duty, meaning that states 'cannot sit back and

[243] Supra n. 6, Risvas, at p. 584.
[244] Supra n. 64, González, O'Keefe and Williams, at p. 55 (per González). As Williams said in interview, maritime powers 'wouldn't even entertain the argument that the 2001 Convention was filling in the gaps' of the LOSC (Supra n. 4, Williams).
[245] Supra n. 84, O'Keefe, at p. 104; Supra n. 103, Manders.

do nothing'; this is in fact incorrect.[246] This is not reflective of the actual *legal* duties of states, which have instead been shown to be relatively passive and indifferent to potential or imminent threats, and instead appears to be reflective of wishful thinking. Similarly, given that the threats are not directly regulated activities, Forrest might be incorrect to suggest that the slowness of cooperation under UNESCO Convention is a positive development because it slows the pace of activities directed at UCH.[247] As Firth more accurately relays about the duties to protect UCH from indirect activities, 'the limitations on the duty are that they apply only to such means as are "practicable" . . . and the imperative to prevent adverse effects is moderated by the inclusion of "or mitigate". The state is not, therefore, under an absolute obligation to prevent adverse effects from activities incidentally affecting UCH'.[248] Dromgoole rightly concluded, therefore, that Article 5 is a 'relatively soft obligation'.[249] It is in the context of this weak and passive duty incumbent on states to protect UCH against indirect, incidental and illegal threats, and in which unilateralism and sovereign autonomy remain the beating heart of international UCH protection, that we turn to Chapter 4 which explores the extent to which states will actually prioritise UCH protection above their own competing socioeconomic interests.

[246] Supra n. 84, O'Keefe, at p. 65.
[247] Supra n. 44, Forrest, at p. 51.
[248] Firth, A., (2013), *Marine Spatial Planning and the Historic Environment*, Fjord Ltd (Salisbury), (at: http://www.fjordr.com/uploads/3/0/0/2/3002891/5460mainfinal_report_140213.pdf; accessed 18 December 2018), at p. 28.
[249] Supra n. 63, Dromgoole, at p. 345.

Chapter 4

International Compliance and the UNESCO Convention

Chapter Abstract:

Having explored the normative weaknesses inherent within a 'duty to cooperate' within international law in Chapter 3, this chapter now goes on to explore the critical issue of poor international compliance with agreements to protect underwater cultural heritage (UCH). It casts pessimistic aspersions on the capacity of public international law, as an equilateral architecture and characteristically consent-based system, to properly coerce or compel states to comply with international obligations where they receive little net gain from compliance, whether in the form of economic or political currency. By identifying UCH as a 'global public good', on account of its non-rival and non-excludable characteristics, it argues that the overspilling of benefits to communities outside of the states charged with its protection are lost as externalities. This results in a poor incentive for states to produce such goods and, instead, facilitates poor collective action and the systemic temptation to free ride off the production of others. It evidences this by giving numerous worldwide examples of poor compliance in the area of UCH protection, as well as drawing on relevant literature, interview feedback and other reports and documentary forms of evidence.

1. Introduction: Compliance with International Obligations to Protect Underwater Cultural Heritage

As highlighted in Chapter 3, merely agreeing to cooperate ad hoc will do little to protect UCH from the increasingly severe threats from indirect, incidental or illicit activities. What is needed is for states to be motivated to implement and enforce effective legislation. In other words, there also needs to be a high level of *compliance* among states with the principle of UCH protection. However, there has been surprisingly little discussion on the issue of state compliance with the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention)[1] and United Nations 1982 Convention on the Law of the Sea (LOSC),[2] in terms of UCH protection. For example, in her leading book, *Underwater Cultural Heritage and International Law*,

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.

[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.

published in 2013, Dromgoole has a chapter examining 'implementation issues' under the UNESCO Convention.[3] However, the chapter is more concerned with how states might interpret the Convention's rules on the management of UCH protection, rather than critically examining the systemic lack of compliance by states or whether states would implement and enforce such rules in the first place.[4] Nevertheless, recent scholarship has begun to show an awareness of this weakness within the global framework. For example, a PhD submitted in 2018 at the University of Southampton conducted a comparative analysis of laws and archaeological practices among states parties in the Adriatic Sea, locating issues with compliance by states with the UNESCO Convention.[5]

This chapter now goes considerably further than these previous studies by drilling into the underlying causes and theoretical underpinnings of pervasive low compliance with the UNESCO Convention and LOSC. It therefore maps the landscape in which new solutions to poor compliance can finally be examined, drawing upon social scientific strands of literature detailing global public goods, rational choice theory, legal realism and constructivism, and a broader critique of utilising consent-based systems of law as a means to address the very consent-based weaknesses of such systems. After bringing in a panoply of examples of poor worldwide compliance, the chapter goes on to conclude that additional motivations are needed before sovereign states can be expected to properly engage in the protection of UCH, such as by making additional political or economic gains from such protection. It also defends this pessimistic depiction of international law by highlighting widespread subscription to a realist view of international relations, demonstrating that self-centred rationalism remains at the heart of all compliance challenges, even when viewed under a constructivist and institutionalist lens.

[3] Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at pp. 307-337.
[4] Ibid, at pp. 307-337.
[5] MacKintosh, R.F., (2018), *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Implementation and Effectiveness*, University of Southampton, Doctoral Thesis.

2. Global Public Goods and the Challenges of International Compliance

(a) Underwater Cultural Heritage as a Global Public Good

Published in 1999 and building upon theories first introduced in the 1970s,[6] Kaul et al's 'ground-breaking'[7] multi-authored text set the groundwork for an entire social sciences movement exploring the challenges of *global public goods*.[8] Research across this field highlighted that, in the inter-national context, the benefits of producing public goods may not be captured by the states producing them, leading to a natural disinclination to produce such goods.[9] In terms of definitions, when referring to a "good", the theory is not focused on a tangible item of tradeable property, but upon an act or process which has a positive overall benefit for society; the opposite of which is a "bad".[10] The previously noted multiple abstract values of UCH protection, in Chapter 2, would therefore be examples of such public good. The term "global", in terms of public goods, is open to some interpretation. Inge Kaul herself regarded "global" as meaning that the goods 'must cover more than one group of countries'.[11] It should also display universal characteristics, by reaching 'a broad spectrum of the global population', including across genders, ethnicities, religions, income lines, as well as future generations.[12]

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[6] Russett, B.M. and Sullivan, J.D., (1971), 'Collective Goods and International Organization', 25(4) *International Organization* 845-865; Olson, M., (1971), 'Increasing the Incentives for International Cooperation', 25(4) *International Organization* 866-874.

[7] Brousseau, E. Dedeurwaerdere, T. and Siebenhüner, B., (2012), 'Introduction', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 1-18, MIT Press (Cambridge, MA), at p. 2; Carbone once referred to 'Global Public Goods' as the 'buzzword' of the 2000s decade, much like 'New International Economic Order' in the 1970s and 'Sustainable Development' in the 1990s (Carbone, M., 'Supporting or Resisting Global Public Goods? The Policy Dimension of a Contested Concept', 13(2) *Global Governance* 179-198, at p. 185).

[8] Kaul, I., Grunberg, I. and Stern, M. (Eds.), (1999), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press (Oxford). See also Kaul, I., Conceição, P., Le Goulven, K. and Mendoza, R.U. (Eds.), (2003), *Providing Global Public Goods: Managing Globalization*, Oxford University Press (Oxford); Kaul, I. and Conceição, P. (Eds.), (2006), *The New Public Finance: Responding to Global Challenges*, Oxford University Press (Oxford); Supra n. 7, Brousseau, Dedeurwaerdere and Siebenhüner.

[9] Goldsmith, J.L. and Posner, E.A., (2006), *The Limits of International Law*, Oxford University Press (Oxford), at pp. 100-101; Barrett, S., (2007), *Why Cooperate?: The Incentive to Supply Global Public Goods*, Oxford University Press (Oxford), at pp. 11-13; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford).

[10] Ibid, Kaul, Grunberg and Stern, at p. 456; Vadi, V., (2014), 'Public Goods, Foreign Investments and the International Protection of Cultural Heritage', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 231-248, Hart (Oxford), at p. 242.

[11] Kaul, I., Grunberg, I. and Stern, M., (1999), 'Defining Global Public Goods', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 2-16, Oxford University Press (Oxford), at p. 10.

[12] Ibid, Kaul, Grunberg and Stern, at p. 11.

Defining "publicness" might be more technical, yet economists have consistently relied on measures of non-rivalry and non-excludability to assess a good's *public* value.[13] In economic terms, a non-rival good is one in which the cost of its production for a marginal (additional) consumer is zero.[14] In other words, the consumption of the good by one person does not reduce its value or enjoyment by others. A non-excludable good, on the other hand, is one in which it is not possible to prevent consumers who have not paid for that good from gaining the benefit of it.[15] It is here that the multiple value perspective of UCH, as explored in Chapter 2, translates neatly into its recognition as a global public good. First, the protection of UCH is a non-rival good: somebody receiving multiple 'values' from the protection of the *Titanic* wreck, for example, would not reduce the amount of available value for others to enjoy. Second, the protection of UCH is predominantly a non-excludable good: while you may protect the *Titanic* wreck and even establish borders around the site in an attempt to *exclude* others from enjoying it; it would still be difficult, if not impossible, to exclude others around the world from, for example, receiving cultural, historical, ecological, existence, excitement, or intrinsic values or, in the case of subsequent photos and videos, aesthetic values, from the protected site. Seeing UCH as a global public good therefore concurs with the findings of others that public archaeological sites,[16] as well as the protection of cultural heritage[17] and the environment,[18] are all examples of global public goods.

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[13] Ibid, Kaul, Grunberg and Stern, at p. 1; Supra n. 9, Kaul, Grunberg and Stern, at pp. 453-456.

[14] Adams, R.D. and McCormick, K., (1987), 'Private Goods, Club Goods, and Public Goods as a Continuum', 45(2) *Review of Social Economy* 192-199; Kaul, I. and Mendoza, R.U., (2003), 'Advancing the Concept of Public Goods', in *Providing Global Public Goods: Managing Globalization*, I. Kaul, P. Conceição, K. Le Goulven and R.U. Mendoza (Eds.), 78-111, Oxford University Press (Oxford).

[15] Pasour Jr, E.C., (1981), 'The Free Rider as a Basis for Government Intervention', 5(4) *Journal of Libertarian Studies* 453-464; Cornes, R. and Sandler, T., (1996), *The Theory of Externalities, Public Goods, and Club Goods*, Cambridge University Press (Cambridge), at pp. 159-161.

[16] Mason, R., (2002), 'Assessing Values in Conservation Planning: Methodological Issues and Choices', in *Assessing the Values of Cultural Heritage: Research Report*, M. de la Torre (Ed.), 5-31, Getty Conservation Institute (Los Angeles), at p. 13.

[17] Francioni, F., (2012), 'Public and Private in the International Protection of Global Cultural Goods', 23(3) *European Journal of International Law* 719-730, at p. 719; Supra n. 10, Vadi, at pp. 231-239; Navrud, S. and Ready, R.C., (2002), 'Why Value Cultural Heritage?', in *Valuing Cultural Heritage: Applying Environmental Valuation Techniques to Historic Buildings, Monuments and Artifacts*, S. Navrud and R.C. Ready (Eds.), 3-9, Edward Elgar (Cheltenham); Serageldin, I., (1999), 'Cultural Heritage as Public Good: Economic Analysis Applied to Historic Cities', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 240-254, Oxford University Press (Oxford).

[18] Bodansky, D., (2012), 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' 23(3) *European Journal of International Law* 651-668, at p. 662; Heal, G., (1999), 'New Strategies for the Provision of Global Public Goods: Learning from International Environmental Challenges', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 220-240, Oxford University Press (Oxford); Barrett, S., (1999), 'Montreal versus Kyoto: International Cooperation and the Global Environment', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 192-219, Oxford University Press (Oxford).

It is worth noting that non-rivalry and non-excludability are rarely pure, but can be seen on a continuum.[19] For example, while an endless number of people could theoretically enjoy the *Titanic* wreck (making it non-rival in characteristic), eventually the site would suffer from congestion or pollution as a result of over-use, which may gradually decrease its marginal value to other users.[20] Similarly, especially through the development of technology, it is increasingly possible to adjust the exclusivity of goods, i.e., privatising them, even if they are intrinsically public goods in nature.[21] These two economic variables can therefore define three other categories of goods: *private goods* are generally those which are highly excludable and rivalrous;[22] *club goods* are those which are generally non-rivalrous, but highly excludable;[23] and *common pool resources* are those which are highly rivalrous, but which lack excludability.[24]

Each of these is capable of being applied to UCH, depending on the particular regulatory treatment that UCH receives. For example, if UCH were only viewed as res nullius, capable of being commoditised by salvage rights as it was under LOSC Article 303(3), then it would be a common pool resource suffering the same unfortunate pathologies of the Tragedy of the Commons (see infra).[25] Similarly, anachronistically viewing cultural heritage as only cultural "property", subject to private dominion, would also turn the good excludable (by property law) and rivalrous (by being enjoyed by a limited number of people), thus making it a private good.[26] Club goods are more rare, although it is possible to still see some examples in the UCH context. For example, a pay-per-view underwater

[19] Supra n. 11, Kaul, Grunberg and Stern, at pp. 4 and 11.
[20] Kotchen, M.J., (2005), 'Impure Public Goods and the Comparative Statics of Environmentally Friendly Consumption', 49(2) *Journal of Environmental Economics and Management* 281-300; Birulin, O., (2006), 'Public Goods with Congestion', 129(1) *Journal of Economic Theory* 289-299.
[21] Krisch, N., (2014), 'The Decay of Consent: International Law in an Age of Global Public Goods', 108(1) *American Journal of International Law* 1-40, at p. 4; Supra n. 9, Kaul, Grunberg and Stern, at p. 460; Kaul, I., (2012), 'Rethinking Public Goods and Global Public Goods', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 37-54, MIT Press (Cambridge, MA), at p. 40.
[22] Supra nn. 11 and 14.
[23] Supra n. 15, Cornes and Sandler; Sandler, T. and Tschirhart, J., (1997), 'Club Theory: Thirty Years Later', 93(3-4) *Public Choice* 335-355; Nitzan S. and Ueda., K., (2009), 'Collective Contests for Commons and Club Goods', 93(1-2) *Journal of Public Economics* 48-55.
[24] Hardin, G. (1968), 'The Tragedy of the Commons', 162 *Science* 1243-1248; Wijkman, P.M., (1982), 'Managing the Global Commons', 36(3) *International Organization* 511-535; De Moor, T., (2015), *The Dilemma of the Commoners: Understanding the Use of Common Pool Resources in Long-Term Perspective*, Cambridge University Press (Cambridge); Dasgupta, P. Karl-Göran M. and Vercelli, A., (Eds.), 1997, *The Economics of Transnational Commons*, Oxford University Press (Oxford); Ostrom, E. Gardner, R. and Walker, J., (1994), *Rules, Games, and Common-Pool Resources*, University of Michigan Press (Ann Arbor).
[25] Ibid, Hardin; Vadi, V., (2016), *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press (Cambridge), at p. 32-33.
[26] Supra n. 11, Kaul, Grunberg and Stern, at p. 3; Supra n. 17, Francioni, at p 723.

museum or dive trail would deliver non-rival (near renewable) benefits, but could exclude access (and value enjoyment) for non-paying visitors. Similarly, as is explored further in Chapter 7, utilising regional rules to share the protection and enjoyment of heritage across sea basins arguably turns them into club goods for the benefit of members (i.e., states in the region).[27] Therefore, Barbash-Riley was probably mistaken when she referred to UCH as a 'common pool resource' in 2015, on the basis that it is characterised by high subtractability (rivalry) and saying that this is because 'removing artifacts from a shipwreck subtracts the benefits that other users could gain'.[28] Such a view would imply that UCH's main values are its extractive and tangible values, i.e., values which are prone to rivalry. However, as argued above and in Chapter 2, many of the most important values from UCH protection are in fact non-rival and can permit a theoretically infinite number of beneficiaries.

(b) International Compliance Failure in the Production of Global Public Goods

By the interoperation of free riding and Prisoner's Dilemma, global public goods – such as UCH protection – are especially prone to underproduction and international cooperation failure.[29] Free riding effectively arises when users can gain the utility of a good without having to pay the cost of its production, encouraging producers to cut their output in order to capture the benefits invested by others.[30] It dictates that when public goods are non-excludable, stakeholders will be perpetually tempted to capture the marginal benefits of production invested by other producers, given that the marginal cost of consumption is near to zero.[31] For highly rivalrous goods, like salvageable treasure,

[27] Sandler, T., (2006), 'Regional Public Goods and International Organizations', 1(1) *Review of International Organizations* 5-25; Estevadeordal, A., Frantz, B. and Nguyen, T.R. (Eds.), (2005), *Regional Public Goods: From Theory to Practice*, Inter-American Development Bank (Washington DC). See Chapter 7.

[28] Barbash-Riley, L., (2015), 'Using a Community-Based Strategy to Address the Impacts of Globalization on Underwater Cultural Heritage Management in the Dominican Republic', 22(1) *Indiana Journal of Global Legal Studies* 201-240, at p. 233.

[29] Kaul, I., (2012), 'Global Public Goods: Explaining Their Underprovision', 15(3) *Journal of International Economic Law* 729-750; Shaffer, G.C., (2012), 'International Law and Global Public Goods in a Legal Pluralist World', 23(3) *European Journal of International Law* 669-693, at p. 674; Cafaggi, F., (2012), 'Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads', 23(3) *European Journal of International Law* 695-718, at p. 703; Supra n. 10, Vadi, at p. 239ff.

[30] Supra n. 18, Barrett, at p. 198; Supra n. 11, Kaul, Grunberg and Stern, at pp. 6-7; Olson, M., (1971), *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press (Cambridge, MA), at p. 113.

[31] Ibid; Dionisio, F. and Gordo, I., (2006), 'The Tragedy of the Commons, the Public Goods Dilemma, and the Meaning of Rivalry and Excludability in Evolutionary Biology', 8(2) *Evolutionary Ecology Research* 321-332.

such a competition for limited goods, with rapidly diminishing marginal benefits, will cause a "tragic" race to consume the commons.[32]

In the global public good context, this difficulty of free riding is then further antagonised by the famous game theoretical model of Prisoner's Dilemma, relating to cooperation strategy.[33] This holds that in situations where cooperation between players would lead to a more positive outcome for all players, but selfish game playing would lead to greater benefits for the selfish players and losses for the players attempting to cooperate, then rational game players who are unaware of the other party's strategy will naturally pursue a selfish strategy – even if it risks all players losing.[34] The interoperation of these two principles then translate into a negative trade-off between marginal costs and marginal benefits for the numerous 'players' (nation states) in international governance.[35] Working collectively, sharing the cost of production, states could produce a global good at a far lower marginal cost.[36] However, as the marginal benefits from the production of others rises, the temptation to free ride on their investment without bearing any of the costs becomes greater.[37]

Prisoner's Dilemma ensures that states will be increasingly tempted to pursue a selfish strategy in order to receive the marginal benefit available to themselves, even if a long-term strategy of cooperation would be better for everyone overall.[38] Unfortunately, the supremacy of sovereign equality and absolute territorial rule[39] only encourages states to consider *their own* marginal costs and benefits from each course of action.[40] With nearly 200 players and a large array of strategic options to producing global goods, achieving such cooperative patterns between states can become 'unwieldy' for highly *public*

[32] Supra n. 9, Barrett, at p. 70; Supra n. 24, Hardin.
[33] Supra n. 11, Kaul, Grunberg and Stern, at pp. 7-8; Snidal, D., (1985), 'Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes', 79(4) *American Political Science Review* 923-942.
[34] E.g., Keohane, R.O., (1984), *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press (Princeton); Krasner, S.D. (Ed.), (1983), *International Regimes*, Cornell University Press (Ithaca). See infra subsection (d).
[35] Supra n. 18, Bodansky, at p. 653; Supra n. 10, Vadi, at p. 239.
[36] Supra n. 18, Barrett, at pp. 197-198.
[37] Barrett, S., (2003), *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford University Press (Oxford), at p. 29.
[38] Supra n. 18, Barrett, at p. 198; Walker, B., Barrett, S., Polasky, S., Galaz, V., Folke, C., Engström, G., Ackerman, F., Arrow, K., Carpenter, S., Chopra, K. and Daily, G., (2009), 'Looming Global-Scale Failures and Missing Institutions', 325(5946) *Science* 1345-1346.
[39] See Chapter 5.
[40] Supra n. 18, Barrett, at p. 198.

goods.[41] All states are intrinsically tempted towards a selfish strategy unless there is sufficient evidence that the other players will cooperate and, yet, without strong levels of trust, there is a likely risk that a state's good production will not reach the total output needed, before other states begin free riding and undermining that state's production.[42] As Shaffer says, 'states and other actors will not invest in global public goods if their independent action will have no impact or if they can free ride on the investment of others.'[43]

Further, given that private economic goods are more excludable and rivalrous, they are routinely preferred as an investment over social and environmental goods. States can capture the full benefit of economic activities invested for their national gain, whereas social and environmental goods have inefficient externalities which spill over to the international community, making them an inherently poor investment.[44] This is particularly antagonised by the intergenerationality of global public goods. The fact that the protection of cultural heritage delivers benefits to future generations means that those investing in that good today will not reap the full benefit of that investment.[45] This freedom to externalise losses also corroborates with the notion of a regulatory "race to the bottom", where states – motivated by the higher marginal gains to lower marginal costs available – compete in the provision of lax regulatory environments for economic activity.[46] In the marine environment, this race to lower standards is all too familiar and routine, as manifested by poor enforcement and flags and ports of convenience.[47]

The various strategies to overcome collective action failures with regard to global public goods have thus become a critical focus for international scholars. It is argued that the

[41] Supra n. 11, Kaul, Grunberg and Stern, at p. 15; Supra n. 29, Shaffer, at p. 681; Supra n. 37, Barrett, at p. 39.
[42] Goldsmith and Posner refer to this issue as 'multilateral Prisoner's Dilemma', rather than coordination games (supra n. 9, Goldsmith and Posner, at p. 87); Supra n. 21, Krisch; Supra n. 11, Kaul, Grunberg and Stern, at p. 15; Supra n. 9, Barrett, at p. 13; Supra n. 18, Bodansky, at p. 653; Morgera, E., (2012), 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law', 23(3) *European Journal of International Law* 743-767, at p. 749.
[43] Supra n. 29, Shaffer, at p. 674.
[44] Supra n. 37, Barrett, at pp. 50-51; Supra n. 18, Bodansky, at p. 668.
[45] Sandler, T., (1999), 'Intergenerational Public Goods: Strategies, Efficiency and Institutions', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 20-50, Oxford University Press (Oxford).
[46] Butler, H.N. and Macey, J.R., (1996), 'Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority', 14(2) *Yale Law & Policy Review* 23-66; Woods, N.D., (2006), 'Interstate Competition and Environmental Regulation: A Test of the Race-to-the-Bottom Thesis', 87(1) *Social Science Quarterly* 174-189.
[47] See Chapter 5.

more that 'game players' (states) are able to communicate, understand one another's likely strategy and build collective trust and goodwill, the more that they will be willing to risk the cost of investment on trust that other players will not defect and begin free riding.[48] Gradually, increased trust and communication through 'repeated games' could lead the players to transform a *negative sum game*, where one player gaining will cause another player to lose, into a *positive sum game*, i.e., the cliché win-win in which the players pool resources and negotiate the allocation of effort according to true collective preferences.[49] In addition to creating more effective systems than consent-based law to capture and deter free riding, the full cognisance of one another's true interests and preferences can also prevent harms becoming an externality, by ensuring that states cannot simply ignore the damage to another's interests.[50]

There is therefore a requirement to ensure that all states are meaningfully bound by regimes which capture, compensate, or trade off all of the underspills and overspills produced by their actions.[51] The difficulty for negotiating states, however, is that there is no superior order which can effectively and meaningfully *punish* or *deter* free riding states who will eventually defect and pursue a selfish strategy and gain a significant short-term benefit to themselves, while diminishing any built-up goodwill among the players.[52] The fear that others will free ride also disincentivises states from investing political and economic resources into collective action solutions. Thus, the players must first themselves set up the rules to detect and punish defecting states and to effectively incentivise compliance through the development of new supranational enforcement architecture:[53] an act which is ironically, itself, prone to intensive free riding and externalities.

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[48] Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford), at pp. 52-55; Cuéllar, M-F., (2004), 'Reflections on Sovereignty and Collective Security, 40(2) *Stanford Journal of International Law* 211-258.

[49] Ibid, Martin; Supra n. 11, Kaul, Grunberg and Stern, at p. 8; Supra n. 18, Heal, at p. 236; Supra n. 29, Shaffer, at p. 675.

[50] Ibid, Martin; Supra n. 9, Kaul, Grunberg and Stern, at p. 464. See Chapter 6, Section 5.

[51] Supra n. 48, Martin, at p. 55; Supra n. 18, Heal, at pp. 237-238; Supra n. 37, Barrett, at p. 11.

[52] Supra n. 9, Goldsmith and Posner, at p. 86; Oye, K.A. (Ed.), (1986), *Cooperation under Anarchy*, Princeton University Press (Princeton).

[53] Supra n. 9, Goldsmith and Posner, at p. 87; Supra n. 21, Krisch, at p. 4; Supra n. 48, Martin, at pp. 53-54; Supra n. 33, Snidal; Stein, A.A., (1983), 'Coordination and Collaboration: Regimes in an Anarchic World', in *International Regimes*, S.D. Krasner (Ed.), 115-140, Cornell University Press (Ithaca); Martin, L.L., (1992), 'Interests, Power, and Multilateralism', 46(4) *International Organization* 765-792.

(c) Overcoming Consent-Based Law in a Consent-Based Legal System

The arguments above have suggested that states who agree to protect UCH will require a considerable degree of motivation before they agree to restrain their own activities or before they carry out aspirational obligations with any meaningful effect.[54] Thus, even when states have committed towards a collective aim within an international treaty, there needs to be specific characteristics inherent within the framework which actually induces such active cooperation.[55] Although a subject which has been undernourished in the past,[56] the last few years has witnessed a greater interest in the capacity (or incapacity) of *public international law* to address this shortfall.[57] While some authors have highlighted the potential for 'general principles' of international law, as a source of law, to provide for such erga omnes norms;[58] such principles are in reality too abstruse, unpredictable and ambiguous to pre-emptively drive state behaviour towards the global good.[59] Furthermore, they are most frequently based on soft law and very generalised objectives which are, by their nature, poorly executed in the day-to-day legal systems of states and subject to constant contradiction and conflict.[60] Most critically of all, general principles have been likened to 'meta-principles' which only assist in the interpretation of law or the resolution of conflicting rules, with little concreteness as a behaviour-modifying norm.[61]

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[54] See also infra Section 3.

[55] Supra n. 18, Barrett, at p. 193.

[56] Supra n. 18, Bodansky, at p. 657.

[57] Benvenisti, E. and Hirsch, M. (Eds.), (2004), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge University Press (Cambridge); Petersmann, E.U., (2012), 'Mini-Symposium on Multilevel Governance of Interdependent Public Goods Introduction and Overview: A Research Agenda for Making 'Global Public Goods Theory' More Policy Relevant', 15(3) *Journal of International Economic Law* 709-719; Supra n. 29, Kaul; Esty, D.C. and Moffa, A.L.I., (2012), 'Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime' 15(3) *Journal of International Economic Law* 777-791; Cafaggi, F. and Caron, D.D., (2012), 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium', 23(3) *European Journal of International Law* 643-649; Supra n. 18, Bodansky; Supra n. 29, Shaffer; Supra n. 29, Cafaggi; Supra n. 17, Francioni; Supra n. 42, Morgera; Nollkaemper, A., (2012), 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure', 23(3) *European Journal of International Law* 769-791.

[58] Simma, B. and Alston, P., (1988), 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 *Australian Yearbook of International Law* 82-108; Petersen, N., (2007), 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation', 23(2) *American University International Law Review* 275-310; Baslar, K., (1997), *The Concept of the Common Heritage of Mankind in International Law*, Martinus Nijhoff (Leiden), at pp. 368-369.

[59] Guzman, A.T., (2002), 'A Compliance-Based Theory of International Law', 90(6) *California Law Review* 1823-1888, at pp. 1878-1883; Paradell-Trius, L., (2000), 'Principles of International Environmental Law: An Overview', 9(2) *Review of European Community & International Environmental Law* 93-99, at pp. 94-95; Chinkin, C.M., (1989), 'The Challenge of Soft Law: Development and Change in International Law', 38(4) *International & Comparative Law Quarterly* 850-866. See also Chapter 6.

[60] Ibid; Brownlie, I., (2008), *Principles of Public International Law*, 7th Edn, Oxford University Press (Oxford), at p. 278.

[61] Boyle, A., (2010), 'Soft Law in International Law-Making', in *International Law*, M.D. Evans (Ed.), 3rd Edn, 122-140, Oxford University Press (Oxford), at pp. 133-134; Sands, P., (1998), 'Treaty, Custom and

Similarly, development of customary law – traditionally by the combination of widespread state practice (usus) with a belief that such practice is legally required (opinio juris sive necessitates)[62] – is a wholly unreliable and unsuitable avenue for the production of rules to produce global public goods. Such legal rules are archetypically *reactive* in nature and, given their general uncertainty and ambiguity, would only capture defective behaviour after it has occurred.[63] This general uncertainty also places an unacceptably high burden of proof upon claimant states[64] and has the same problems of securing compulsory jurisdiction and effecting consequent enforcement.[65] Perhaps most of all, it also fails to mollify persistently objecting states, who are inevitably the main offenders for free riding or recalcitrance in the case of global public goods.[66] Indeed, it is the very

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the Cross-Fertilization of International Law', 1(1) *Yale Human Rights and Development Journal* 85-106; Elias, O. and Lim, C., (1997), 'General Principles of Law, 'Soft' Law and the Identification of International Law', 28(3) *Netherlands Yearbook of International Law* 3-49.

[62] C.f., It is not forgotten that there is a 'modern' approach to identifying customary legal rules, however, this does not alter the findings presented. See for example: Roberts, A.E., (2001), 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95(4) *American Journal of International Law* 757-791; Tasioulas, J., (2007), 'Customary International Law and the Quest for Global Justice', in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, A. Perreau-Saussine and J.B. Murphy (Eds.), 307-335, Cambridge University Press (Cambridge); Schabas, W., (2009), 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals', in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, J. Doria, H-P. Gasser and M. Cherif Bassiouni (Eds.), 77-101, Brill (Leiden); Baker, R.B., (2010), 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21(1) *European Journal of International Law* 173-204.

[63] Supra n. 9, Goldsmith and Posner, at p. 86; Bodansky, D., Brunnée, J. and Hey, E., (2008), 'International Environmental Law: Mapping the Field' in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée, and E. Hey (Eds.), 1-28, Oxford University Press (Oxford), at p. 23; Klabbers, J., (2008), 'Compliance Procedures', in *Oxford Handbook on International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 995-1009, Oxford University Press (Oxford), at p. 1001; Kammerhofer, J., (2004), 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15(3) *European Journal of International Law* 523-553; Petersen, N., (2016), 'Customary International Law and Public Goods', in *Custom's Future: International Law in a Changing World*, C.A. Bradley (Ed.), 253-274, Cambridge University Press (Cambridge); Bodansky, 'Customary (And Not So Customary) International Environmental Law', 3(1) *Indiana Journal of Global Legal Studies* 105-120, at pp. 118-119; Kelly, J.P., (2000), 'The Twilight of Customary International Law', 40(2) *Virginia Journal of International Law* 449-544; Trachtman, J.P., (2016), 'The Growing Obsolescence of Customary International Law', in *Custom's Future: International Law in a Changing World*, C.A. Bradley (Ed.), 172-204, Cambridge University Press (Cambridge).

[64] As was famously said in the Lotus Case, the 'rules of law binding upon States therefore emanate from their own free will [and any] restrictions upon the independence of states cannot be presumed' (*The Case of the S.S. Lotus*, (7 September 1927), Publications of the Permanent Court of International Justice, Series A.-No. 70, at p. 18); Ibid, Klabbers, at pp. 1001-1002; Dumberry, P., (2016), *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge University Press (Cambridge), at pp. 39-42.

[65] Ryngaert, C., (2015), *Jurisdiction in International Law*, 2nd Edn, Oxford University Press (Oxford), at pp. 34-44.

[66] Stein, T.L., (1985), 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26(2) *Harvard International Law Journal* 457-482; Charney, J.I., (1986), 'The Persistent Objector Rules and the Development of Customary International Law', 56(1) *British Yearbook of International Law* 1-24; Byers, M., (2008), *Custom, Power and the Power of Rules: International Relations and Customary*, Cambridge University Press (Cambridge).

point of global public goods that they suffer from a ritualised lack of activity among states; thus, making it highly unlikely that sufficient usus and opinio juris can be found to alter this prospectively.

In other words, customary law is no better than general principles or international treaties in overcoming the consent-based nature of international law.[67] As Harrison is forced to concede in his account of international law protecting the marine environment, international law 'is a decentralized legal system, which means that no court or tribunal has compulsory jurisdiction . . . and jurisdiction ultimately rests upon the consent of the relevant States.'[68] Similarly, Crawford has written how the 'absence of a legislature with universal authority, and the consensual basis for judicial jurisdiction, reinforce the voluntarist and co-operative character of most international law most of the time.'[69]

Given the inadequacy of unresponsive and unknown customary rules and general principles, the best avenue for traditional international law to address global public goods appears to be by *international treaty*.[70] However, the use of international treaties to address global public goods is, in effect, an attempt to use legal rules requiring prior consent to be bound as the means to address a legal system whose faults are based on the need for prior consent: states are free to reject international treaties or to negotiate them in a manner which best represents their internal interests, thus making international treaties an ineffective means to address complex and highly public global goods.[71] As Krisch says:

> 'the consent element in international law has proved to be highly resilient [and] direct challenges to it have remained circumscribed. Treaty law does not seem to have come under significant pressure at all; the key role of

[67] Goldsmith, J.L. and Posner, E.A., (1999), 'A Theory of Customary International Law', 66(4) *University of Chicago Law Review* 1113-1177; Supra n. 64, Dumberry, at pp. 24-30; Supra n. 61, Elias and Lim.
[68] Harrison, J., (2017), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press (Oxford), at p. 7.
[69] Crawford, J., (2012), *Brownlie's Principles of Public International Law*, 8th Edn, Oxford University Press (Oxford), at p. 16.
[70] Supra n. 63, Bodansky, Brunnée and Hey, at p. 23.
[71] Guzman, A.T., (2011), 'Against Consent', 52(4) *Virginia Journal of International Law* 747-790; Besson, S., (2016), 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox', 29(2) *Leiden Journal of International Law* 289-316; Brunnée, J., (2010), 'Consent', in *Max Planck Encyclopedia of Public International Law*, Oxford University Press (Oxford), (at: http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1388?prd=EPIL; accessed: 18 December 2018); Pergantis, V., (Ed.), (2017), *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives*, Edward Elgar (Cheltenham).

> consent in creating new rules via treaties, though obviously impeding efforts at lawmaking, continues to be firmly anchored. If anything, processes of treaty making may have moved toward broader and firmer inclusiveness, making multilateralism more robust.'[72]

State motivation to join treaty regimes is going to often be formulated from a calculated decision which appraises relative advantages and disadvantages, or the 'net benefit', to that state in joining (although, see infra Section (d) for additional constructivist motivations).[73] Furthermore, their motivation to comply once inside a regime remains heavily linked to both the normative strength of the legal duty, as well as the relative risks and potential benefits to them in not properly complying or carrying through on their commitments.[74] A critical issue is therefore the capacity of inter-state commitments, such as the UNESCO Convention, to actually bring about both *participation* and *compliance*.[75] For goods of a particularly 'public' nature – such as those addressing global environmental and cultural interests – states are unlikely to find considerable net gain in joining effective treaty frameworks or in rewriting the rules of the game to unilaterally constrain one another.[76] In fact, they are more likely to view stringent regimes towards public aims as a risky investment, in which other states may easily free ride and undermine global collective action.[77]

However, it is possible for states to obtain net gain from regimes through other sources beyond direct provisions within the treaty, such as in the form of political or economic currency.[78] Political currency, for example, can arise through the notion of comity,

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[72] Supra n. 21, Krisch, at p. 26.
[73] Supra n. 63, Bodansky, Brunnée and Hey, at p. 12; Supra n. 9, Kaul, Grunberg and Stern, at p. 485.
[74] Supra n. 63, Klabbers, at pp. 1003-1005; Nollkaemper, A., (2002), 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order', 13 *Yearbook of International Environmental Law* 165-186, at pp. 169 and 175; Mitchell, R.B., (2008), 'Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law', in *Oxford Handbook on International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 893-921, Oxford University Press (Oxford).
[75] Coleman, K.P. and Doyle, M.W., (2004), 'Introduction: Expanding Norms, Lagging Compliance', in *International Law and Organization: Closing the Compliance Gap*, E.C. Luck and M.W. Doyle (Eds.), 1-18, Rowman & Littlefield (Lanham), at pp. 1 and 3; Downs G.W. and Trento, A.W., (2004), 'Conceptual Issues Surrounding the Compliance Gap', in *International Law and Organization: Closing the Compliance Gap*, E.C. Luck and M.W. Doyle (Eds.), 19-40, Rowman & Littlefield (Lanham), at p. 23; Supra n. 18, Barrett, at p. 193; Supra n. 63, Bodansky, Brunnée and Hey, at p. 11; Abbott, K.W. and Snidal, D., (2004), 'Pathways to International Cooperation, in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, E. Benvenisti and M. Hirsch (Eds.), 50-84, Cambridge University Press (Cambridge), at p. 51.
[76] Supra n. 11, Kaul, Grunberg and Stern, at p. 7; Supra n. 37, Barrett, at p. 33.
[77] Supra n. 21, Krisch, at p. 9.
[78] Supra n. 75, Downs and Trento, at p. 20; Supra n. 9, Kaul, Grunberg and Stern, at p. 485.

wherein states are motivated to accept potential losses inherent in one treaty with a view to securing future cooperation from states relating to other matters.[79] However, political currency more commonly arises by a government's desire to maintain the support of their living national citizenry.[80] The more political pressure that is levied on a national government, by political campaigning, democratic processes or effective media coverage, the greater baseline political gain a state can expect from accepting greater limitations upon their sovereignty through stringent treaty obligations. For example, in terms of environmental degradation, it often takes some catastrophic or global headline disaster before such political pressure foments transboundary commitments and willingness to resign national independence towards the prevention of such disasters after-the-event.[81] The increased governmental action on marine plastic pollution in the aftermath of recent television series and media campaigns, despite the threats having remained the same for decades, is a good example of this.[82]

As a result, a large part of research in the social sciences and international law fields in the context of global public goods has been the development of treaty frameworks which can address this shortfall in motivation. The challenge is two-fold: not only must states be motivated to *participate* in treaty regimes, but those treaty regimes must also possess effective rules for ensuring internal *compliance*.[83] In other words, even if a treaty framework such as the UNESCO Convention is successful in securing widespread state ratifications, it still might not be enough to induce states to cooperate. Scholars have spent the last two decades evaluating the design of effective 'sticks' and 'carrots' which can effectively induce a positive or negative incentive in states to join regimes which *also* possess powerful and effective rules.[84] Sticks, in particular, have predominantly come in

[79] E.g., Simmons, B.A., (2000), 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs', 94(4) *American Political Science Review* 819-835.
[80] Slaughter, A-M., (2004), 'International Relations Theory and International Law: A Prospectus', in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, E. Benvenisti and M. Hirsch (Eds.), 16-49, Cambridge University Press (Cambridge), at pp. 47-48.
[81] Whomersley, C., (2016), 'Regional Cooperation in the North Sea under Part IX of the Law of the Sea Convention', 31(2) *International Journal of Marine and Coastal Law* 339-358, at p. 350; 'In the past, initiatives to build better marine co-operation in the North Sea have often been prompted by some form of environmental disaster or crisis.' (House of Lords, (2015), *The North Sea Under Pressure: Is Regional Marine Co-Operation the Answer?*, 17 March 2015, European Union Committee, 10th Report of Session 2014–15, UK Parliament (London), (at: https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/137/137.pdf; accessed: 18 December 2018)).
[82] Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.
[83] Supra n. 75; Supra n. 21, Krisch.
[84] Sand, P.H., (1999), 'Carrots Without Sticks? New Financial Mechanisms for Global Environmental Agreements', 3 *Max Planck Yearbook of United Nations Law* 636-388; Supra n. 18, Barrett; Supra n. 37, Barrett, at p. 11; Supra n. 9, Barrett, at pp. 6-7; Dorn, A.W. and Fulton, A., (1997), 'Securing Compliance with Disarmament Treaties: Carrots, Sticks, and the Case of North Korea', 3(1) *Global Governance* 17-40; Weikard, H. P. and Dellink, R., (2014), 'Sticks and Carrots for the Design of International Climate

the form of market-based measures, such as a threat of economic loss when regimes limit or prohibit trade with non-members. Whereas carrots might include the provision of eco-funds or capacity building frameworks to incentivise participation. Strategic treaty design can also include a number of variables, such as the nature and stringency of a regime's commitments (soft versus hard, general versus precise, shallow versus deep), as well as its rules on membership, procedure, compliance and enforcement.[85] Once inside a regime, other mechanisms to secure state compliance have also included command-and-control rules, maximum limits, taxation, and the use of market measures.[86]

In addition to developing effective sticks and carrots which can attempt (and often struggle) to compensate or constrain states based on the relative overspills and underspills associated with respective outputs,[87] the only other alternative is the use of some centralised legal framework, such as a global court or World Environment Organization, to more effectively punish free riding or non-compliance.[88] Ironically, however, the public nature of such a global undertaking also makes its development particularly prone to collective action failure. As O'Keefe and Nafziger long ago admitted in the context of UCH protection, while it may be more effective, the establishment of a global regulatory body 'seems unrealistic at this time [and the] best alternative may be to allocate control of the underwater cultural heritage to states'.[89]

The effect of this system built around state willingness to be bound, which is a calculation of political or economic gain, merely maintains a system in which most regimes are only ever as effective as their most powerful advocates, thus reinforcing the hegemonic nature of international law.[90] Indeed, as Bodansky concedes, the success of the Montreal

Agreements with Renegotiations', 220(1) *Annals of Operations Research* 49-68; Börner, J., Marinho, E. and Wunder, S., (2015), 'Mixing Carrots and Sticks to Conserve Forests in the Brazilian Amazon: A Spatial Probabilistic Modeling Approach', 10(2) *PloS one* 0116846.

[85] Supra n. 63, Bodansky, Brunnée and Hey, at p. 12; Supra n. 74, Mitchell, at p. 894; Voigt, C., (2015), 'Environmentally Sustainable Development and Peace: The Role of International Law', in *Promoting Peace Through International Law*, C.M. Bailliet and K.M. Larsen (Eds.), 168-190, Oxford University Press (Oxford), at p. 169.

[86] Supra n. 18, Heal; Supra n. 75, Coleman and Doyle, at p. 7.

[87] Supra n. 84; Supra n. 37, Barrett, at p. 18; Supra n. 21, Krisch, at pp. 9 and 30-31.

[88] Supra n. 9, Goldsmith and Posner, at p. 87; Supra n. 48, Martin, at pp. 52-53; Supra n. 29, Shaffer, at p. 675; Brousseau, E. and Dedeurwaerdere, T., (2012), 'Global Public Goods: The Participatory Governance Challenges', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 21-36, MIT Press (Cambridge, MA), at p. 21; Weston, B.H. and Bollier, D., (2013), *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press (Cambridge), at pp. 221-222.

[89] O'Keefe, P.J. and Nafziger, J.A.R., (1994), 'The Draft Convention on the Protection of Underwater Cultural Heritage', 25(4) *Ocean Development and International Law* 391-418, at p. 402.

[90] Supra n. 9, Goldsmith and Posner; Krisch, N., (2005), 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16(3) *European Journal of International*

Protocol within the UN Framework Convention on Climate Change was more likely a result of the calculated decision of the United States to phase out the global market in chlorofluorocarbon-emitting products, rather than anything to do with the regime's mix of sticks and carrots.[91] This hegemony of international law which translates power into legal influence is also fully visible in the law of the sea where, as Chapter 5 highlights, the law has always remained reflective of the interests of the dominant sea powers. Thus, while the 'power' may be gradually shifting from the Western sphere to other parts of the world, such as by the increasing economic power of traditionally developing regions or their coalescence into more effective 'clubs' at the international table, the fundamental engine at the heart of international treaty law remains prone to questions of incentivisation, unilateralism, inertia and power.

(d) Defending Thick Rationalism from a Constructivist Uncoupling

Before proceeding to evaluate whether the global public goods theories can be evidenced in the context of UCH protection, it is worth finally defending the pessimistic account of international cooperation espoused here, which some may try to critique for its central reliance upon *Rational Choice* theory. By rationalising all states down to self-interested bargaining "players" which only negotiate by cold and self-interested calculations of net gain and loss, some might argue that this *realist* perspective of state motivation neglects the much more complex picture of compliance drivers.[92] *Constructivists* might argue, for example, that the power politics inherent in the realist account is a highly simplistic and pessimistic interpretation of state behaviour, which can in fact be formed from constructed elements in their surrounding environment, such as feeling obligated to observe norms through socialisation and deliberation, or feeling bound through a moral or political sense of fairness or legal normativity.[93] Here, such normativity of posited

Law 369–408; Strange, S., (1987), 'The Persistent Myth of Lost Hegemony', 41(4) *International Organization* 551-574.

[91] Supra n. 18, Bodansky, at p. 660.

[92] Ruggie, J., (1998), 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', 52(4) *International Organization* 855-885, at p. 855; Checkel, J.T., (2001), 'Why Comply? Social Learning and European Identity Change', 55(3) *International Organization* 553-588; Koskenniemi, M., (2006), *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press (Cambridge).

[93] Ibid, Ruggie; Brunnée, J. and Toope, S.J., (2013), 'Constructivism and International Law', in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, J.L. Dunoff and M.A. Pollack (Eds.), 119-145, Cambridge University Press (Cambridge); Supra n. 48, Martin, at p. 58; Supra n. 63, Bodansky, Brunnée and Hey, at pp. 12-13; Supra n. 80, Slaughter, at p. 38; Haas, P.M., (2015), *Epistemic Communities, Constructivism, and International Environmental Politics*, Routledge (Abingdon); Franck, T.M., (1990), *The Power of Legitimacy Among Nations*, Oxford University Press (Oxford); Wendt, A., (1994), 'Collective Identity Formation and the International State', 88(2) *American Political Science Review* 384-396; Aceves, W.J., (2001), 'Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution', 39(2) *Columbia Journal of*

legal rules therefore comes from states' constructed beliefs in the moral or legal requirement to be bound, not necessarily requiring the positive legal architecture of hard 'law'.[94] As with *Institutionalists* and even *Liberalists*, they would also propose that the increasing participation in the UNESCO Convention and the proliferation of future multilateral negotiations over the optimum treatment for UCH, will increase the substance and normative force of inter-state rules.[95] All would therefore argue that changing cultures and patterns of interaction, dialogue and narrative around new-found "interdependence" and "cooperation", rather than "independence" and "co-existence", will gradually shift the behaviour of states towards stronger cooperation ethics and a sense of interrelated duties and moral obligations.[96]

However, a resolute body of sociolegal realists and pluralists comfortably maintain that 'legal rules are only effective insofar as the underlying incentives of the actors are properly aligned', or in other words, the extent to which they are willing to be bound.[97] As Bodansky, Brunnée and Hey have said, 'the rationalist strands of international relations theory [criticise] this design logic through a progressive deepening of initial

Transnational Law 299-394; Bird, R.C., (2003), 'Procedural Challenges to Environmental Regulation of Space Debris', 40(3) *American Business Law Journal* 635-685; Brunnée, J. and Toope, S.J., (2002), 'Persuasion and Enforcement: Explaining Compliance with International Law', 13 *Finnish Yearbook of International Law* 273-295.

[94] Supra n. 9, Goldsmith and Posner, at p. 100; Supra n. 80, Slaughter, at p. 35; Arend, A.C., (1998), 'Do Legal Rules Matter? – International Law and International Politics', 38(2) *Virginia Journal of International Law* 107-154.

[95] Ibid, Arend; Supra n. 80, Slaughter, at pp. 25-27; Supra n. 34, Keohane; Supra n. 34, Krasner; Keohane, K.O. and Martin, L.L., (1995), 'The Promise of Institutionalist Theory', 20(1) *International Security* 39-51; Slaughter, A-M., (1995), 'International Law in a World of Liberal States', 6(3) *European Journal of International Law* 503-538.

[96] Abbott, K.W. and Snidal, D., (2002), 'Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation', Paper presented at the American Political Science Association Annual Meeting, 20 August 2002, Boston), at: https://www.researchgate.net/profile/Kenneth_Abbott/publication/228746902_Filling_in_the_Folk_Theorem_The_Role_of_Gradualism_and_Legalization_in_International_Cooperation_to_Combat_Corruption/links/5611bf7908aec422d117133f.pdf?origin=publication_detail; accessed 1 May 2019); Supra n. 63, Bodansky, Brunnée and Hey, at p. 13.

[97] Mearsheimer, J.J., (1994), 'The False Promise of International Institutions', 19(3) *International Security* 5-49; Simmons, B.A., (2002), 'Capacity, Commitment, and Compliance International Institutions and Territorial Disputes', 46(6) *Journal of Conflict Resolution* 829-856; Supra n. 79, Simmons; Downs, G.W., Rocke, D.M. and Barsoom, P.N., (1996), 'Is the Good News About Compliance Good News About Cooperation?', 50(3) *International Organization* 379-406; Downs, G.W., Danish, K.W. and Barsoom, P.N., (2000), 'The Transformational Model of International Regime Design: Triumph of Hope or Experience?', 38(3) *Columbia Journal of Transnational Law* 465-514; Downs, G.W. and Jones, M.A., (2002), 'Reputation, Compliance, and International Law', 31(1) *Journal of Legal Studies* 95-114; D'Amato, A., (1982), 'The Concept of Human Rights in International Law', 82(6) *Columbia Law Review* 1110-1159; Handl, G., (1997), 'Compliance Control Mechanisms and International Environmental Obligations', 5 *Tulane Journal of International and Comparative Law* 29-50; Joyner, C.C., (1998), 'Compliance and Enforcement in New International Fisheries Law', 12(2) *Temple International and Comparative Law Journal* 271-300; Morrow, J.D., (2002), 'The Laws of War, Common Conjectures, and Legal Systems in International Politics', 31(1) *Journal of Legal Studies* 41-60; Posner, E.A., (2002), 'Some Economics of International Law: Comment on Conference Papers', 31(1) *Journal of Legal Studies* 321-329.

framework treaties . . . on the ground that it is unlikely to succeed where a regime requires states to make costly policy changes.'[98] The consent-based nature of international lawmaking thus ensures sufficient latitude is preserved in the interpretation of intentionally ambiguous norms, through which players can more freely select the norm's compliance pull.[99] This rationalisation of global cooperation and the inherent weaknesses appears to be found by many academic analyses and is too often demonstrated by the empirical evidence.[100] As Lisa Martin has said, '[t]heories of international cooperation made a big leap forward by accepting the assumption that states are self-interested and have conflicts of interest with one another.'[101] In other words, while norms can easily become "law" in a constructive sense, without first being processed through Westphalian or positivist mechanisms of authority,[102] this does not alter the fact that compliance with all norms is driven by individual motives or interests.

Critically, one can comfortably establish that none of the international relations theories on state motivation to cooperate are, or need be, necessarily exclusive.[103] The rationalist account is still alive in the constructivist and institutionalist depiction of events: states may be motivated by questions of fairness, legitimacy and rightness, or feel increasingly bound by growing structural interactions and shifting dialogue, but the underlying engine through which decisions are made – as with any decision for ordinary persons in an everyday context – will still be based on rational thinking and logic. In other words, realists can still critically consider how behavioural factors impact decision-making. The growth of a sense of legal or moral duty, or wider social or cultural motivations, may thus

[98] Supra n. 63, Bodansky, Brunnée and Hey, at p. 13; Goldsmith, J.L. and Posner, E.A., (2002), 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31(1) *Journal of Legal Studies* 115-139.
[99] See Chapter 4.
[100] Supra n. 80, Slaughter, at p. 37; Supra n. 63, Bodansky, Brunnée and Hey, at p. 13; Supra n. 9, Goldsmith and Posner, at p. 86; Supra n. 74, Nollkaemper, at p. 175; Allott, P., (1988), 'State Responsibility and the Unmaking of International Law', 29(1) *Harvard International Law Journal* 1-26.
[101] Supra n. 48, Martin, at p. 51.
[102] Supra n. 93, Brunnée and Toope, 'Constructivism and International Law', at pp. 127-129; c.f. Risse, T. and Sikkink, K., (1999), 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in *The Power of Human Rights: International Norms and Domestic Change*, T. Risse, S.C. Ropp and K. Sikkink (Eds.), 1-38, Cambridge University Press (Cambridge), at p. 29; See Chapter 5.
[103] Keohane, R.O., (1997), 'International Relations and International Law: Two Optics', 38(2) *Harvard International Law Journal* 487-502; Koh, H.H., (1997), 'Why Do States Obey International Law?', 106(8) *Yale Law Journal* 2599-2659; Franck, T.M., (2006), 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100(1) *American Journal of International Law* 88-106, at p. 91; Supra n. 92, Checkel; Ayres, I. and Braithwaite, J., (1992), *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press (Oxford), at p. 51; Checkel, J.T., (1997), 'International Norms and Domestic Politics: Bridging the Rationalist—Constructivist Divide', 3(4) *European Journal of International Relations* 473-495; Thompson, A., (2002), 'Applying Rational Choice Theory to International Law: The Promise and Pitfalls', 31(1) Journal of Legal Studies 285-306.

expand a state's *rational* argument in favour of cooperation; not, necessarily, negating the rationalisation of their chosen strategies.[104] This blending between rationality and reflexive normativity is likely to be where most international lawyers would place themselves.[105] As Guzman has explained it, international actors are motivated to comply with commitments from socially constructed rational concerns, such as fear of reciprocated non-compliance, retaliation, or loss of reputation.[106] Therefore, while institutionalists and regime theorists attempt to argue that global regimes and institutions coordinate all states towards progressive objects,[107] they cannot escape the fact that such institutions and regimes are orienting states towards objects to which they have already consented and continue to consent by rational choice.[108]

This is how realism should really be understood: not as viewing international relations as a global libertarian or anarchic contest between powers, eschewing all social construction;[109] but recognising that compliance does essentially arise through a web of social relations, while also remaining anchored to concepts of individual autonomy, self-

[104] Chayes, A. and Chayes, A.H., (1995), *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, at pp. 25-27; Raustiala, K., (2000), 'Compliance &(and) Effectiveness in International Regulatory Cooperation', 32(3) *Case Western Reserve Journal of International Law* 387-440; Huang, P.H., (2002), 'International Law and Emotional Rational Choice', 31(1) *Journal of Legal Studies* 237-258; Raustiala, K. and Slaughter, A-M., (2002), 'International Law, International Relations and Compliance', in *Handbook of International Relations*, W. Carlsnaes, T. Risse and B. Simmons (Eds.), Sage (London), 538-558, at p. 548; Supra n. 11, Kaul, Grunberg and Stern, at p. 14; Krasner, S.D., (1991) 'Global Communications and National Power: Life on the Pareto Frontier', 43(3) *World Politics* 336–366; Kratochwil, F., (1989), *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press (Cambridge), at p. 72; Kingsbury, B., (1998), 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19(2) *Michigan Journal of International Law* 345-372, at pp. 354-356.

[105] Supra n. 93, Brunnée and Toope, 'Constructivism and International Law', at p. 129.

[106] Guzman, A.T., (2008), *How International Law Works: A Rational Choice Theory*, Oxford University Press (Oxford); Guzman, A.T., (2002), 'A Compliance-Based Theory of International Law', 90(6) *California Law Review* 1823-1888. Many scholars have also highlighted the importance of participation and reputation in the international community of states, which indirectly supports this account of state motivation: Kelly, C.R., (2004), 'Realist Theory and Real Constraints', 44(2) *Virginia Journal of International Law* 545-636; Koskenniemi, M., (1990), 'The Pull of the Mainstream', 88(6) *Michigan Law Review* 1946-1962; Levit, J.K., (2004), 'The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits', 45(1) *Harvard International Law Journal* 65-182; Scott, R.E. and Stephan, P.B., (2004), 'Self-Enforcing International Agreements and the Limits of Coercion', 2004 *Wisconsin Law Review* 551-630; Simmons, B.A., (2000), 'Money and the Law: Why Comply with the Public International Law of Money?', 25(2) *Yale Journal of International Law* 323-362.

[107] Supra n. 75, Abbott and Snidal; Abbott, K.W. and Snidal, D., (2002), 'Values and Interests: International Legalization in the Fight Against Corruption', 31(1) *Journal of Legal Studies* 141-177.

[108] Simmons, B.A., (2002), 'Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes', 46(2) *Journal of Conflict Resolution* 829-856.

[109] E.g. Supra n. 90, Krisch; Kono, D.Y., (2007), 'Making Anarchy Work: International Legal Institutions and Trade Cooperation', 69(3) *The Journal of Politics* 746-759; Swaine, E.T., (2002), 'Rational Custom', 52(3) *Duke Law Journal* 559-628; Barkin, J.S., (2003), 'Realist Constructivism', 5(3) *International Studies Review* 325-342.

determination and freedom of choice.[110] It is thus difficult to clearly distinguish between them: rationalists are apparently concerned with compliance push and pull, with an awareness of how this is impacted by social context; whereas constructivists and institutionalists are just as concerned with the impact of social context, with a similar awareness of how this exerts a push and pull towards compliance. The key difference is that a rationalist's yearning for a verifiable science would merely lead them to conclude that legitimacy, power, punishment, reputation, retaliation, coercion, negotiation, incentivisation, and sanction are all important in creating *effective* "law". Thus, while state-based and treaty-based law may have greater legitimacy, they are not the only *legitimate* source of law and not the only *effective* sources of law.[111] As Chapter 9 argues further, transnational and local communities can indeed develop their own legal norms, which have significant behaviour-modifying properties; but while such rules can enjoy good observation and implementation in managerialist frameworks, they can drive forward more effective collective action when integrated with motivational systems of coercion and incentivisation, i.e., sticks and carrots.

Similarly, such 'repeated interactions' – as are the essence of the institutionalist and constructivist arguments – are an accepted and central aspect of the rational choice model.[112] Indeed, as is often emphasised, effective international cooperation is developed from 'trust, reciprocity, transparency, cooperative knowledge, shared gains, and habits of cooperation among' parties.[113] In fact, the building up of collective trust and goodwill among states constructs the surrounding environment in which states rationalise their own

[110] There are countless examples of studies which show that decisions to comply are largely derived from rational decision-making, which relates to external contexts. For example: Abbott, K.W., (2003), 'Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements', 26(1) *Cornell International Law Journal* 1-58; Fisher, R., (1981), *Improving Compliance With International Law*, University Press of Virginia (Charlottesville); Ginsburg, T. and Adams, R.H., (2004), 'Adjudicating in Anarchy: An Expressive Theory of lnternational Dispute Resolution', 45(4) *William and Mary Law Review* 1229-1340; Goldsmith, J.L. and Posner, E.A., (2003), 'International Agreements: A Rational Choice Approach', 44(1) *Virginia Journal of International Law* 113-144; Haas, P.M., (2000), 'Choosing to Comply: Theorizing from International Relations and Comparative Politics', in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, D. Shelton (Ed.), 43-64, Oxford University Press (Oxford); Moore, D.H., (2003), 'A Signaling Theory of Human Rights Compliance, 97(2) *Northwestern University Law Review* 879-910; Nakagawa, J., (1998), 'Securing Compliance in Traditional and Contemporary International Law: A Theoretical Analysis', in *Trilateral Perspectives on International Legal Issues: From Theory to Practice*, T.J. Schoenbaum, J. Nakagawa and L.C. Reif (Eds.), 49-57, Transnational Publishers (New York); Tallberg, J., (2002), 'Paths to Compliance: Enforcement, Management, and the European Union', 56(3) *International Organization* 609-643.

[111] See Chapter 5.

[112] Supra n. 18, Heal, at p. 236; Supra n. 18, Bodansky, at pp. 659-660; Smith, E.M., (1991), 'Understanding Dynamic Obligations: Arms Control Agreements', 64(6) *Southern California Law Review* 1549-1606.

[113] Conca, K., (2002), 'The Case for Environmental Peacemaking', in *Environmental Peacemaking*, K. Conca and G.D. Dabelko (Eds.), 1-22, Johns Hopkins University Press (Baltimore), at p. 11.

interests, as highlighted above.[114] Even if one recognises the essential role of multilateral regimes as the inducement of post-ratification cooperation,[115] which was recognised as a vital function of the UNESCO Convention,[116] one must still acknowledge that the rules of such cooperation processes and the motivations for complying with bargains are still, at their core, based on calculated decisions by those subject to the law. As Slaughter has said of regime theory-based institutionalism, in her influential introduction to international relations theories on cooperation; it still 'depends on the existence of common interests among states […]. Where state interests do not converge, power politics is likely to continue to rule.'[117]

Most of all, the real chink in the armour of all anti-rationalist accounts of compliance motive, at least when reframing it normatively, is the harmful reliance on facilitating gradual shifts in state behaviours over time, through processes of iteration and interaction, rather than by more immediate processes of persuasion, coercion or incentivisation.[118] As Risvas says of the potential for future international laws protecting UCH which are more restrictive of state power, 'states are the ultimate rule-makers in public international law and history shows that what is currently controversial can be acceptable after some time.'[119] Descriptively, this may have grains of truth; but normatively it results in an international law which is highly reactive (or passive), through its reliance on gradual changes in motivation, socialisation and trust over extended periods – a period in which catastrophic environmental destruction is presently taking place.[120] Indeed, it is difficult

[114] Supra n. 104; Abbott, K.W. and Snidal, D., (2000), 'Hard and Soft Law in International Governance', 54(3) *International Organization* 421-456; Joyner, C.C., (1998), 'Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law', 19(2) *Michigan Journal of International Law* 401-444; Supra n. 75, Abbott and Snidal, at p. 50; Supra n. 37, Barrett, at p. 11. E.g., According to Levy, the Helsinki Protocol's power was 'not in binding states to undertake measures they otherwise would not . . . but in helping shift states' perceptions of their self-interest' (Levy, M.A., (1995), 'International Co-Operation to Combat Acid Rain', in *Green Globe Yearbook of International Co-Operation on Environment and Development*, H.E. Bergesen, G. Parmann and Ø.B. Thommessen (Eds.), 59-68, Oxford University Press (Oxford), at p. 61); Skjærseth, J.B., Stokke, O.S. and Wettestad, J., (2006), 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms', 6(3) *Global Environmental Politics* 104-120.

[115] E.g., Krasner, S.D., (1983), 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in *International Regimes*, S.D. Krasner (Ed.), 1-22, Cornell University Press (Ithaca); Supra n. 34, Keohane; Supra n. 95, Keohane and Martin.

[116] See infra Section 3(d).

[117] Supra n. 80, Slaughter, at pp. 27-28.

[118] Setear, J.K., (1996), 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37(1) *Harvard International Law Journal* 139-230; Supra n. 104, at p. 544; Hafner-Burton, E.M. and Tsutsui, K., (2007), 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most', 44(4) *Journal of Peace Research* 407-425, at p. 414.

[119] Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590, at p. 590.

[120] See Chapter 5.

to see a transformation of state practice to prioritise UCH protection over economic activity, despite the very formal recognition among most states and stakeholders of the need for an urgent response to its ritual destruction.[121] In sum, there may be truths in all the diverse international relations theories of international cooperation depending on the specific context, but most of them infer a need to accept a truly fundamental role for rational choices and realistic motivations. They are also practically limited in resolving free riding challenges by their reliance on securing compliance by slow processes of deliberation and socialisation.

3. Difficulties of International Compliance and the Protection of Underwater Cultural Heritage

(a) The Unknown Nature of Underwater Cultural Heritage

The first driver of low compliance with international commitments to protect UCH – as contained throughout the UNESCO Convention and within Article 303(1) of LOSC – can be understood as being the result of UCH's widely undiscovered, under-explored, and under-studied nature. The lack of visibility of UCH is a well-known and central concern among the UCH community and is likely to lead to the under-protection of UCH for a number of reasons.[122] First, the lack of public awareness of UCH and of access to it, means that many of its *potential* values – e.g., historical, archaeological, educational, social, recreational, cultural, ecological, aesthetic, excitement, existence, empathy, intrinsic, economic, and so on – remain dormant and under-utilised. This is perhaps why the general public feel UCH might as well be brought to the surface, so as to enjoy some of these values – if a little less of them – in a more immediately accessible format, such as in a museum.[123] This is also why most in the UCH preservation community now see the most vital aspect of their mission as engaging the non-diving public with UCH by

[121] Supra n. 1, UNESCO Convention, Preamble.

[122] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File; Dunkley, M. and Smith, A., (2015), *Accessing England's Protected Wreck Sites: Guidance Notes for Divers and Archaeologists*, Historic England (London), (at: https://historicengland.org.uk/images-books/publications/accessing-englands-protected-wreck-sites-guidance-notes/heag075-guidance-notes-for-divers-and-archaeologists/; accessed 18 December 2018), at p. 18; Gribble, J., Parham, D. and Scott-Ireton, D.A., (2009), 'Historic Wrecks: Risks or Resources?', 11(1) *Conservation and Management of Archaeological Sites* 16-28, at pp. 20-21 (per Parham).

[123] Supra n. 82, Williams; 'I guess you have been looking into the wrecks on the coast of Java as well. And if you have a 9th Century wreck, okay nobody is interested […]. It's only when the incredible collection of ceramics comes out that the art world gets interested.' (Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File). E.g., Bordelon, C.Z., (2005), 'Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law', 7(1) *San Diego International Law Journal* 173-214, at p. 189; Bederman, D.J. and Spielman, B.D., (2008), 'Refusing Salvage', 6 *Loyola Maritime Law Journal* 31-58, at pp. 56-57.

increasing in situ access,[124] such as by virtual reality, shallow dive trails, glass-bottom boats, photogrammetry, 3D-imagery, and "telepresence".[125] In many ways, this is a strategy which aims to have the public convert much of this dormant value into kinetic value.

As Guérin said in interview, 'in old times we dragged the Obelisk from Egypt to Paris or elsewhere because we thought in Egypt, no one can see it anyway.'[126] Adding, 'we can change this', but 'it's just a question of making the effort to . . . make underwater heritage visible. Museums, dive trails, virtual whatever, but you have to make that effort.'[127] This view seems to be almost unanimous among the UCH community (excepting those who still maintain a pro-salvage view, as explored in Chapter 2). Unfortunately, as has been said many times, UCH seems presently locked in a vicious cycle of underfunding, wherein the lack of public awareness of the many values of in situ preservation, leads to a lack of investment in the resource by public authorities, which then decreases the public funding into activities for protection, engagement, access, and enjoyment.[128]

Another reason for the underproduction of UCH protection on account of its generally unknown nature is that it encourages states to utilise *reactive* and ad hoc processes of protection. Thus, given that the precise nature and potential value of UCH impacted by a state's economic activity is mostly unknown, there is a strong reliance on the use of Heritage Impact Assessments and ongoing reporting mechanisms for offshore operators who *might* impact UCH. Such reactive systems of protection can obviously carry potential problems, such as the economic and time pressures on offshore developers and heritage agencies. Some could argue that the quality of pre-work surveys within Environnmental Impact Assessments are sufficient for the purposes of UCH. For example, De Vrees suggested that, before giving out a licence to offshore developers, the

[124] E.g., Supra n. 122, Guérin; Burgin, L.R., (2015), 'Managing Michigan's Underwater Heritage: The Past, Present, and Future of Thunder Bay National Marine Sanctuary', *University of Michigan Working Papers in Museum Studies: Future Leaders*, Number 1 (2015) (at: http://ummsp.rackham.umich.edu/wp-content/uploads/2015/09/burgin-working-paper-fl-series-aug-7.pdf; accessed: 18 December 2018), at p. 6; Watts, G.P. and Knoerl, T.K., (2007), 'Entering the Virtual World of Underwater Archaeology', in *Out of the Blue: Public Interpretation of Maritime Cultural Resources*, J.H. Jameson Jr. and D.A. Scott-Ireton (Eds.), 223-239, Springer (New York), at p. 224; Halsey, J.R., (1996), 'Shipwreck Preservation in Michigan: 20 Years On', 1(3-4) *Common Ground: Archeology and Ethnography in the Public Interest* 27-33, at p. 33.
[125] Hall, J.L, (2011), 'Things, Inc.: A Case for *In Situ* Application', in *Maritime Law: Issues, Challenges & Implications (Laws and Legislation)*, J.W. Harris (Ed.), 27-52, Nova Science Publishers (New York), at pp. 42 and 48-49.
[126] Supra n. 122, Guérin.
[127] Supra n. 122, Guérin.
[128] Supra n. 122, Gribble, Parham and Scott-Ireton, at p. 23. (per Parham).

Dutch government conducts quite detailed surveys and produces quite detailed sonar maps of the seabed, such that they 'already know roughly what is there.'[129] The same has been said by many others recently. For example, Pieters and Varmer have both suggested that a greater amount of funding should go into the preliminary investigations before licencing offshore activities.[130]

However, as Maarleveld says, unfortunately it is only the value of 'scientific interest' which is considered before determining whether UCH should be protected, recovered, or discarded, meaning that 'the range of scales on which it is valued is mostly not very elaborate.'[131] As Peeters also responded, given the considerable costs and impracticalities of adopting land-based planning approaches in the submarine environment, the result is 'that surveys are less extensive, more or less guaranteeing that no archaeology can be found'.[132] What is more, during prior Impact Assessments the present technology, such as side-scan sonar, multi-beam sonar, sub-bottom profiling and magnetometer scans, do not capture sufficient detail about potentially impacted UCH, or effectively distinguish human-linked organic material from natural organic material, or indeed properly detect the detail of materials below the seabed.[133] The result is that potentially impacted sites invariably require further and more expensive analysis in order to assess their value, such as by visual inspection and grab sample analysis.[134] Even then, it is not always possible to 'value' such distant UCH in abstract and without the cultural and archaeological context. What is more, the expense and technological limits of survey data means that most impacted UCH sites or objects will not be discovered unless and until they immediately interfere with economic activities, such as being found while drilling

[129] De Vrees, L., (2018), Interview with Leo De Vrees, 21 March 2018, Transcript on File.
[130] DeRudder, T. and Maes, F. (Eds.), (2015), *Workshop: The Legal Protection of Underwater Cultural Heritage 23 April 2015 – Final Report*, Maritime Institute, University of Ghent (Ghent), (at: http://www.vliz.be/imisdocs/publications/ocrd/274121.pdf; accessed 8 January 2019), at p. 12 (per Pieters and Varmer).
[131] Maarleveld, T.J., (2012), 'The Maritime Paradox: Does International Heritage Exist?', 18(4) *International Journal of Heritage Studies* 418-431, at pp. 419-420.
[132] Peeters, H., (2018), Written Response of Hans Peeters, 28 April 2018, Filed with Author.
[133] Tuttle, M.C., (2012), 'Search and Documentation of Underwater Archaeological Sites', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 114-132, Oxford University Press (Oxford); Supra n. 130, DeRudder and Maes, at p. 11; Ibid, Peeters; Sarris, A., Kalayci, T., Moffat, I. and Manataki, M., (2018), 'An Introduction to Geophysical and Geochemical Methods in Digital Geoarchaeology', in *Digital Geoarchaeology: New Techniques for Interdisciplinary Human-Environmental Research*, C. Siart, M. Forbriger and O. Bubenzer (Eds.), 215-236, Springer (New York); Bailey, G.N., (2014), 'New Developments in Submerged Prehistoric Archaeology: An Overview', in *Prehistoric Archaeology on the Continental Shelf: A Global Review*, A. Evans, J. Flatman and N. Flemming (Eds.), 291-300, Springer (New York).
[134] Ibid, Tuttle.

channels or wells, in demersal trawler nets, or by being sucked up into a dredger's drag head.[135]

Although most countries provide incentives to encourage *reporting* of such incidental discoveries, using either carrots (e.g., rewards, salvage awards, attribution) or sticks (e.g., prosecution, fines, reprimand), or a combination of both;[136] the manner in which different countries address these reports can vary. For example, Aznar has discussed how in Spain the heritage experts who initially provided the all-clear in the Heritage Impact Assessment then bear the financial responsibility for ensuring the unexpected heritage is effectively managed.[137] In most countries, however, it is often the economic operator who will have agreed to halt operations or undertake mitigative or protective work as a condition of their licence from the government.[138] However, countries remain nervous of placing too much economic uncertainty and risk on their offshore industries, retaining commitments which are ambiguous and open to flexible forms of responsibility. Furthermore, given the nature of such offshore projects wherein delays could cost upwards of a million dollars a day, to what extent are the operators motivated to report new discoveries which might halt operations? This is a question which has rightfully been raised before. For example, in 2006, Coroneos wrote that the reactive system:

> 'has significant flaws, as it relies on incidental observation and goodwill on the part of the sea bed developer. Unexpected archaeological discoveries during construction programmes generally cost money in terms of time lost. Unless there is some financial advantage in publicising a site – or the authorities have been unofficially alerted – such sites are usually severely compromised or destroyed by the construction works.'[139]

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[135] Flatman, J., (2012), 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy', in *Archaeology in Society: Its Relevance in the Modern World*, M. Rockman and J. Flatman (Eds.), 167-192, Springer (New York), at p. 174; BMAPA and English Heritage, (2003), *Marine Aggregate Dredging and the Historic Environment: Assessing, Evaluating, Mitigating and Monitoring the Archaeological Effects of Marine Aggregate Dredging – Guidance Note*, Wessex Archaeology (Salisbury), (at: https://historicengland.org.uk/images-books/publications/marine-aggregate-dredging-and-the-historic-environment-2003/marineaggregatedredging20032005031514 3759/; accessed: 18 December 2018).

[136] See generally, Dromgoole, S. (Ed.), (2006), *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, 2nd Edn, Martinus Nijhoff (Leiden).

[137] Supra n. 130, DeRudder and Maes, at pp. 10-11.

[138] Supra n. 130, DeRudder and Maes, at pp. 10-11; Supra n. 136, Dromgoole.

[139] Coroneos, C., (2006), 'The Four Commandments: The Response of Hong Kong SAR to the Impact of Seabed Development on Underwater Cultural Heritage', in *Heritage at Risk Special Edition, Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts*, R. Grenier, D. Nutley and I. Cochran (Eds.), 46-48, ICOMOS (Paris), at p. 46.

Yet, while most are open-minded to the rare possibility of non-compliance, they defend the likely actions of economic operators who are widely believed to be sympathetic to the concerns for UCH and aware of their unique responsibility towards it. As Evans once expressed in appreciation of this issue, '[a]lthough compliance is not always enthusiastic, the majority of oil and gas operators adhere to the requirement [to report discoveries].'[140] Similarly, in interview, Maarleveld said that offshore developers can afford to accommodate the interests of archaeologists, but just need better guidance as to when and how.[141] Further, he adds that they are very image conscious in terms of their PR, branding and marketing, and therefore willing to invest in UCH for the purposes of projecting their social responsibility.[142] Nevertheless, he concedes that it does depend on *when* the new discoveries are made, given that large developers will have already invested considerable resources in the preliminary research such that, once they get the 'go-ahead . . . in several months it goes enormously quickly and there's no time for any time-consuming archaeology anymore.'[143]

Similarly, De Vrees accepted that, while he could think of many examples where works had been halted after commencing on account of new discoveries while building on land, he could not think of any examples where halting of operations has happened at sea.[144] Nevertheless, in terms of ensuring compliance, while it may be infeasible to have permanent heritage experts or inspectors on board vessels undertaking operations,[145] national regulation can still significantly drive up reporting by commercial sectors through other means, such as prosecuting and banning future contracts from operators which are found to have breached these rules during spot checks.[146]

Equally importantly, assuming that offshore economic operators even identify and report UCH which could negatively impact on their business interests; it then needs to turn to government or heritage agencies to make an assessment of the potential value of the UCH, in order to determine possible courses of action.[147] Such responses might include creation

[140] Evans, A.M., Firth, A. and Staniforth, M., (2009) 'Old and New Threats to Submerged Cultural Landscapes: Fishing, Farming, and Energy Development', 11(1) *Conservation and Management of Archaeological Sites* 43-53, at p. 44 (per Evans).
[141] Supra n. 123, Maarleveld.
[142] Ibid; Supra n. 130, DeRudder and Maes, at p. 11.
[143] Supra n. 123, Maarleveld.
[144] Supra n. 129, De Vrees.
[145] Supra n. 130, DeRudder and Maes, at pp. 12-13 (per Aznar, Klomp Maes and Pieters).
[146] Supra n. 130, DeRudder and Maes, at p. 12 (per Varmer).
[147] Supra n. 130, DeRudder and Maes, at p. 23 (per Klomp and Dromgoole); Supra n. 136, Dromgoole.

of a protection zone which places a burden on the operator to deviate planned works around the site, which might include additional expense and still leaving residual risks of later inadvertent damage or interference. Another option may be conducting further surveys, on-site analysis or protective work of the UCH, given its generally unknown characteristics, which is also a costly delay for operators, as well as a public expense. Alternatively, a more cost-efficient option might be to simply permit the operator to remove the UCH (or even salvage it in some countries). Given that delays can cost offshore operators millions of dollars and that further on-site investigative work is also expensive, time-consuming and may turn out to be a waste of private or public funding, the heritage agencies implicated with this task might therefore be in a delicate, if not impossible, position.[148] As such, creating small 'archaeological protection zones' (APZs) and deviating work around geophysical anomalies of potential archaeological interest is the norm, even though the site's location has often become public knowledge at this point.[149]

No better example is that illustrated by the recent controversial decision of the UK's Marine Management Organisation (MMO) to award a licence to the Dover Harbour Board (DHB) to dredge for sand in the Goodwin Sands, being a UCH hotspot and potential Marine Conservation Zone, in August 2018.[150] Despite clear public anxieties about proximate UCH in an area which contains a high concentration of UCH and even potential human remains, the heritage advisors did not initially require a detailed magnetometer survey from the developers.[151] What is more, in addition to numerous other concerns from the local community about the planned dredging, the use of a radius of 25 metres for the APZs around anomalies of potential archaeological interest has been considered by many to be too meagre, given the difficulty of identifying dispersed archaeological materials from multi-beam echosounder, side-scan sonar and magnetometer survey alone.[152] It is conceivable, however, that were such impacted UCH clear and visible to society and government agencies from the outset, it would be far

[148] See generally, Martin, J.B. and Gane, T., (2019), 'Weaknesses in the Law Protecting the United Kingdom's Remarkable Underwater Cultural Heritage: The Need for Modernisation and Reform', *Journal of Maritime Archaeology* (Forthcoming); Supra n. 130, DeRudder and Maes, at p. 11 (per Somers).
[149] Ibid, Martin and Gane.
[150] BBC News, 'Goodwin Sands dredging plans 'disgusting'', 26 July 2018, *BBC News*, (at: https://www.bbc.co.uk/news/uk-england-kent-44971642; accessed: 18 December 2018); Lennon, S., 'Call to Suspend Dover Harbour Board Dredging of Goodwin Sands, off Deal, After discovery of Possible World War Two Bomber Plane', 14 September 2018, *Kent Online*, (at: https://www.kentonline.co.uk/deal/news/is-this-part-of-a-warplane-189799/; accessed: 18 December 2018).
[151] Supra n. 148, Martin and Gane.
[152] Supra n. 148, Martin and Gane.

harder to ignore within such processes. In other words, as it stands, states are at liberty to ignore or misinterpret the concept of precautionary management and, unsurprisingly, most of the destruction of UCH therefore continues to be discovered after-the-event.[153] As De Vrees said in interview, '[y]ou are not going to preserve any areas because you *might* . . . find things. That's the difference I think.'[154] Noting that the system is particularly 'reactive' and is not proactive in the sense that we 'maintain or manage different sites, because there are too many anyhow.'[155]

(b) The Uncertain Regulatory Context of Underwater Cultural Heritage

The second factor driving non-compliance with state commitments to protect UCH is likely to be the general unpredictability and uncertainty on critical questions of law surrounding UCH, including questions of ownership, jurisdiction, sovereign rights, and salvage law, as implicated and interacting across a diverse range of states and maritime zones. As Chapter 2 illustrated, the laws of a coastal state may be uncertain or unsettled from a question of international customary practice; and, similarly, as Chapter 5 illustrates, the law of the sea is characterised by a fragmentary patchwork of divergent and unpredictable juridical contexts. In this environment, it is a large unknown how prospective flag states, coastal states, and other "linked" states, may respond to one another's legal views and perspectives on these issues: one state may believe that UCH found within its coastal waters legally belongs to them or that they have rights under UNESCO Article 10(2) or Part XIII of LOSC to regulate such heritage; whereas a prospective flag state may argue that it or one of its nationals has ownership rights in the site; while another state may allege its own ownership or cultural interests in the site or assert salvage rights.[156] This problem is no better beyond coastal waters, where it remains even more uncertain what rights and responsibilities each state has.[157]

This uncertainty makes the job of governments and heritage agencies called upon to value potentially impacted heritage from economic activities more challenging. While it is the case that the potential value of UCH should be constant regardless of regulatory context; the regulatory context could impact greatly upon *who* will be able to effectively capture

[153] See infra. Supra n. 148, Martin and Gane.
[154] Supra n. 129, De Vrees.
[155] Supra n. 129, De Vrees.
[156] Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at p. 121.
[157] UNESCO, (2009), *Information Kit for the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/documents-publications/information-kit-for-the-2001-unesco-convention-on-the-protection-of-the-underwater-cultural-heritage/; accessed: 18 December 2018), at p. 10.

and possess legal rights over those values. Indeed, as was noted in Chapter 2, the UNESCO Convention even steered clear of the subject of legal ownership, given its pervasive uncertainty and political tensity.[158] It appears that most states continue to rightly reject the right of coastal states to assert any form of exclusive control over wreck found in their waters unless it legally belongs to them. As such, if the flag state is uncertain or there is likely to be a contestation over flagged or linked states, or there is any potential for legal wrangling over ownership of parts of the wreck such as the cargo, fixtures, passenger's belongings, or any human remains, it will create a resource which the states or stakeholders implicated in its guardianship will have little knowledge as to who has the legal right to "consume" the multiple intangible values. Given the high cost to a state of exploring the complex legal situation in terms of time, money, and political goodwill, it would probably be determined that a better use of time and resources would be to regard all potential UCH in this environment as of little political or economic value, given the risks of investing further resources without a return. This also includes governance at the subnational level. For example, Aznar has said that implementation of UCH protection is undermined in Spain on account of disagreements between regional municipalities over relative rights and competences.[159]

This complexity of 'Who does what?' is compounded and detrimentally interoperates, therefore, with the generally unknown and undiscovered nature of much UCH. As Maarleveld responds, 'the main problem is that in taking care of the really fragile, really important sites that are out there, you never know beforehand to which nationality it has a link . . . and in fact those links only develop through research.'[160] Adding that the unusual, unidentified or transnational elements of UCH are usually the most interesting and important, but that current processes require some kind of 'labelling' of UCH, often seeing it allocated to a particular state's interests. The labelling of UCH therefore has 'enormous consequences for the way the site is treated, the way the site is managed, the way a site is researched, the way there is interest in the site or not.'[161] This weakness – relating to the unpredictable and complex nature of the international legal system – could

[158] Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 424.
[159] Aznar, M.J., (2006), 'Spain', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 271-296, Martinus Nijhoff (Leiden), at p. 292; Kowalski, W., (2006), 'Poland', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 229-246, Martinus Nijhoff (Leiden), at p. 246.
[160] Supra n. 123, Maarleveld.
[161] Supra n. 123, Maarleveld.

be improved by harmonisation of law and developing more consistent approaches across the ocean context, thus reducing uncertainty about the proper rights and responsibilities of *all* implicated stakeholders. As Aznar said in 2016, approaches to UCH protection 'have to be coherent with well-established rules governing maritime spaces'.[162]

(c) The Global Public Good Nature of Underwater Cultural Heritage

The most significant driver of low compliance with international commitments to protect UCH is UCH's characteristics as a paradigm global public good, as underscored in Section 2 above. This relates to a critical contradiction found in the international legal framework for the protection of UCH, where key instruments such as the UNESCO Convention and the LOSC take a *statist* view of responsibility, but contradictorily stress the importance of that task in terms of the value derived by all *non-state actors*. For example, the UNESCO Convention calls on Coordinating States to 'act on behalf of the States Parties',[163] but then urges states to consider the 'importance of protecting underwater cultural heritage for all *humanity*', noting how UCH is everyone's 'common heritage'.[164] Similarly, Article 149 of the LOSC calls on *nation states* to preserve or dispose of UCH in the Area 'for the benefit of *mankind*'.[165] Both agreements recognise the universality of heritage and, thereby, the radiation of multiple abstract values to global present and future generations, but they undermine this by having to rely on states – protected by national sovereignty and making decisions exclusively benefiting their own citizens – to carry out this protection on behalf of the global community.

This is the nature of our "inter-national" legal system and the indirectness of the system is well known.[166] For example, Dromgoole reminds us that the LOSC does not provide any rights to the key stakeholders actually involved in UCH protection, but rather provides their national governments with the final decision as to how to regulate them

[162] Aznar, M.J., (2017), 'Protecting Underwater Cultural Heritage in EU Waters, A Legal Approach (2016-2017)', *Provisional Report*, Honor Frost Foundation, (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2017/02/Mariano-Aznar-Protecting-underwater-cultural-heritage-in-EU-waters-a-legal-approach-2016-2017.pdf; last accessed: 8 November 2018), at p. 4.
[163] Supra n. 1, UNESCO Convention, Arts. 10(5) and 12(4).
[164] Supra n. 1, UNESCO Convention, Preamble and Art. 2(3) (emphasis added).
[165] Supra n. 2, LOSC, Art. 149.
[166] The 'state is only a fringe player-it may be guilty of failing to legislate, but it will not, in the typical scenario, be itself guilty of polluting the environment' (supra n. 63, Klabbers, at p. 1001); Supra n. 63, Bodansky, Brunnée and Hey, at p. 6; Supra n. 74, Nollkaemper, at p. 167; Bodansky, D. and Brunnée, J., (1998), 'The Role of National Courts in the Field of International Environmental Law', 7(1) *Review of European Community & International Environmental Law* 11-20, at p. 17; Supra n. 75, Coleman and Doyle, at p. 4; Supra n. 9, Kaul, Grunberg and Stern, at pp. 466-467.

accordingly.[167] The difficulty, however, as the following subsections and Chapter 5 all serve to illustrate, is that the aggregated interests of humankind, including future generations, are often likely to differ from the interests of present-day states, whose governments are often more narrowly focused on national economic growth and seeking approval of their living national citizenry.[168]

i. Underwater cultural heritage as transnational heritage

This section brings back into sharp focus the analysis made in Chapter 2, introducing a multiple-value understanding of UCH. It should be recalled therefrom that UCH produces numerous intangible and abstract values, such as historical, archaeological, educational, social, recreational, cultural, ecological, aesthetic, excitement, existence, empathy, intrinsic, and economic value.[169] There are a number of observations that can be made about these many values: (1) they are mostly intangible or even abstract;[170] (2) they are therefore incredibly difficult to quantify and are mostly non-economic and non-marketable in nature;[171] (3) they can vary in quantification from person-to-person meaning they can penetrate political or community borders with relative ease; (4) they are both intragenerational and intergenerational; and (5) their spatial enjoyment can exude to local or to universal levels. In other words, the values are prototypically non-excludable and non-rival in nature and therefore subject to underproduction and free riding: after investing political or financial effort into the preservation of UCH, the actual benefits of such protection may be leaked to other non-excludable beneficiaries as an externality.

As an illustration of their local to global reach, a century-old fishing boat wrecked in a village harbour may only be of historical, cultural and archaeological value to the local community. Alternatively, some heritage may have values that may permeate transnational linkages or networks. For example, this fishing boat may provide

[167] Dromgoole, S., (2010), 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage', 25(1) *International Journal of Marine and Coastal Law* 33-61, at pp. 53-54; Papanicolopulu, I., (2012), 'The Law of the Sea Convention: No Place for Persons?', 27(4) *International Journal of Marine and Coastal Law* 867-874, at p. 871.
[168] Snidal, D., (1991), 'Relative Gains and the Pattern of International Cooperation', 85(3) *American Political Science Review* 701-726; Axelrod, R. and Keohane, R.O., (1985), 'Achieving Cooperation Under Anarchy: Strategies and Institutions', 38(1) *World Politics* 226-254; Benvenisti, E., (2013), 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *American Journal of International Law* 295-333.
[169] See Chapter 2, Section 3.
[170] Jones, S., (2017), 'Wrestling with the Social Value of Heritage: Problems, Dilemmas and Opportunities', 4(1) *Journal of Community Archaeology & Heritage* 21-37, at p. 21.
[171] Ibid, Jones, at p. 26.

archaeological information about a particularly unique form of fishing, which makes it of interest to worldwide historians and archaeologists with an interest in fishing heritage. Moreover, transnational linkages may exist from living relatives, or from communities possessing religious, spiritual, cultural or ethnic connections to certain UCH.[172] For example, the *Kinneret Boat* in Israel is likely to deliver value to observers around the world of the Christian faith, given its close timing and proximity to the life of Jesus Christ.[173] Sometimes it has been viable to create a sense of shared heritage around *regional* UCH, such as a common interest in UCH linked to Vikings or to the Hanseatic League in the Baltic.[174] Alternatively, some values may be more discernibly enjoyed by *national* communities, such as the strong national attachment to naval warships sunk with large loss of life.[175] Alternatively, some heritage might be of such great "significance" that its values permeate a large number of individuals and groups across the world, such that it is regarded as global or *universal* heritage. The World Heritage Committee has developed its own rules for defining 'universal' heritage[176] and the *Titanic* wreck would likely emanate such multiple values to the international community to be regarded as universal UCH.[177]

[172] Simock, A., (2017), 'Aesthetic, Cultural, Religious and Spiritual Ecosystem Services Derived from the Marine Environment', in *The First Global Integrated Marine Assessment: World Ocean Assessment I*, United Nations Group of Experts on the First Process (Eds.), 159-170, Cambridge University Press (Cambridge); UNESCO, (2000), *Third Meeting of Governmental Experts to Consider the draft Convention on the Protection of the Underwater Cultural Heritage: Synoptic Report of Comments on the Draft Convention, Paris, 3-7 July 2000*, UN Doc. CLT-2000/CONF.201/3, at p. 3; Maarleveld, T.J., (2009), 'Drama, Place and Verifiable Link: Underwater Cultural Heritage, Present Experience and Contention', in *Spirit of Place: Between Tangible and Intangible Heritage*, L. Turgeon (Ed.), 97-108, Presses de l'Université Laval (Quebec City); Evans, A.M., (2014), 'Submerged Indigenous Sites', in *Encyclopedia of Global Archaeology*, C. Smith (Ed.), Springer (New York), 7111-7118.

[173] Fisher, D., (1986), 'Israeli Archeologists Rush to Excavate 'Jesus Boat' From Sea of Galilee', 26 February 1986, *Los Angeles Times*, (at: http://www.articles.latimes.com/1986-02-26/news/mn-54_1_jesus-boat; accessed: 18 December 2018); Raban, A., (1988), 'The Boat from Migdal Nunia and the Anchorages of the Sea of Galilee from the Time of Jesus', 17(4) *International Journal of Nautical Archaeology* 311-329.

[174] Van Gorp, B. and Renes, H., (2007), 'A European Cultural Identity? Heritage and Shared Histories in the European Union', 93(3) *Tijdschrift voor economische en sociale geografie* 407-415, at pp. 410-411; Gaimster, D., (2005), 'A Parallel History: The Archaeology of Hanseatic Urban Culture in the Baltic c.1200–1600', 37(3) *World Archaeology* 408-423, at pp. 414-15.

[175] Williams, M., (2000), 'War Graves and Salvage: Murky Waters?', 7(5) *Journal of International Maritime Law* 151-158; Harris, J.R., (2001), 'The Protection of Sunken Warships as Gravesites at Sea', 7(1) *Ocean and Coastal Law Journal* 75-130; Forrest, C., (2012), 'Culturally and Environmentally Sensitive Sunken Warships', 26(1) *Australian and New Zealand Maritime Law Journal* 80-89.

[176] Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, (2017), *Operational Guidelines for the Implementation of the World Heritage Convention*, 12 July 2017, UN Doc. WHC.17/01, UNESCO (Paris), at pp. 77-78.

[177] Martin, J.B., (2018), 'Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: The *Titanic* and *Lusitania* as World Heritage Sites', 33(1) *International Journal of Marine and Coastal Law* 116-165.

This capacity for UCH to permeate value to local and global scales reinforces the well-known argument that UCH is archetypically *transnational* heritage. Indeed, vessels on the sea were themselves the paradigm of transnationality, having customarily travelled between nations and cultures, accumulating passengers, crew, objects, stories, techniques, skills, norms, and languages from around the world.[178] Such transversality becomes greater the further one goes back in history. As Aznar once aptly put it:

> 'What is the modern-day flag State of Etruscan vessels? Greek, Italian? What of the Khmer wrecks embedded in the Mekong Delta? Must they be considered Vietnamese, Laotian, Cambodian or Thai? Or what about the Phoenician fleet? Must it be considered Lebanese, Syrian, Tunisian or, even, Spanish?'[179]

Indeed, if you reach as far back as the study of now-submerged Palaeolithic landscapes, such as in the North Sea, Gulf of Mexico, and South China Sea, long before the creative fiction of nation states, UCH can only be understood as transnational heritage. In interview, each Maarleveld, Firth and Manders provided illustrations of this characteristic 'transnationality' of UCH.[180] Indeed, Maarleveld has previously written on the transnational nature of UCH which is poorly understood through national narratives.[181] Similarly, Firth's prominent monograph on *Managing Underwater Archaeology* utilised a case study of states across North-Western Europe to provide an excellent discussion of the pervasive nationalism present in the management of UCH.[182] His thesis demonstrated that maritime archaeology has the power to challenge the dominant Westphalian narrative on account of the inherently transnational and much more complex nature of heritage and its linkages. However, in some perverse irony, maritime archaeology and the

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[178] Maarleveld, T.J., (2012), 'Ethics, Underwater Cultural Heritage and International Law', in *The Oxford Handbook of Maritime Archaeology*, A. Catsambis, B. Ford and D.L. Hamilton (Eds.), 917-941, Oxford University Press (Oxford), at p. 918; Smith, H.D. and Couper, A.D., (2003), 'The Management of Underwater Cultural Heritage', 4(1) *Journal of Cultural Heritage* 25-33, at p. 30.

[179] Aznar, M.J., (2003), 'Legal Status of Sunken Warships "Revisited"', 9 *Spanish Yearbook of International Law* 61-101, at p. 98.

[180] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File; Supra n. 123, Maarleveld; As Manders responds in interview, 'you have connections in your archaeological material, verifiable links in your archaeological material that go all over the world. You will not be able to identify all those stakeholders immediately and when a wreck on the coast of Namibia is recognised for being Portuguese, then it's not only the Portuguese who are interested because then, after a few years of research, it proves that the Hapsburg house is involved in the trade, et cetera. [H]istory is inclusive as well.' (Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File).

[181] Supra n. 131, Maarleveld; Supra n. 178, Maarleveld, at p. 918.

[182] Firth, A., (2002), *Managing Archaeology Underwater: A Theoretical, Historical and Comparative Perspective on Society and its Submerged Past*, BAR Publishing (Oxford).

consumption of maritime heritage is often used to perpetuate the nationalistic approach to heritage management and to strengthen national identity, eschewing the complex and pluralistic reality.[183] Despite the fact that 'practically, at a human level,' Firth responds in interview, 'ships are sort of supranational entities.'[184]

This capacity for linkages between multiple states is apparent in both the LOSC and UNESCO Convention, which both anticipate ad hoc cooperation between 'linked' states.[185] The weaknesses and inherent difficulties of this 'linked state' system is beyond the remit of this study, but suffice to say that the concept has yet to prove itself as a satisfactory method for expanding actual input of states beyond the binary interests (which are also often politically or economically motivated) of 'flag' states and 'coastal' states. As Maarleveld has said:

> '[Using] national "identity" as the basis for management worldwide, is politically counter-productive in the postcolonial world. In practice, it is mostly impossible to distinguish such an approach from imperialist thinking and it is bound to create tension, rather than to alleviate it. [E]xclusiveness is the inevitable result.'[186]

ii. The misallocation of UCH 'consumers' and 'producers' in the state-based system

The further result is that the distribution of UCH's values remains a complex and often unsatisfactory equation: coastal states will frequently have regulatory jurisdiction (and protective responsibility) over UCH for which the values are distributed to outsiders of that state; just as flag states and port states will make decisions about how to manage UCH which could negatively impact their economic advancement, while insulated from external scrutiny. The inter-national system therefore creates an inefficient allocation of 'producers' and 'consumers' of UCH protection. For example, the protection of the wrecks of the Battle of Jutland would deliver considerable intangible benefits to the national community of citizens in the United Kingdom (who would *consume* the value of production); but much less value to the community of citizens in the Netherlands, Denmark and Norway (who could each *produce* more effective protection as coastal

[183] Ibid, Firth; Supra n. 180, Firth.
[184] Supra n. 180, Firth.
[185] Supra n. 2, , Art. 149; Supra n. 1, UNESCO Convention, Arts. 7 and 9-12.
[186] Supra n. 131, Maarleveld, at pp. 422-423.

states).[187] This is a concern when, as Manders illustrates just in the context of the Netherlands (as at 2009), '[s]hipwrecks from different nations are located all over the globe. For example, German, English, French, American, Belgian, Swedish and Danish shipwrecks have all been discovered in Dutch waters and over a hundred Dutch shipwrecks have been found in different parts of the world'.[188]

One of the primary means to resolve this misallocation of rights and responsibilities has been through bilateral arrangements between flag states of origin and coastal states where the UCH is located.[189] Such bilateral accords can be successful in that they effectively compensate the coastal state in exchange for its agreement to cooperate or protect heritage on behalf of the flag state. An example of a country particularly active in this field has been the Netherlands who, according to Manders in interview, have MOUs relating to the treatment of historic Dutch wrecks with numerous states including Sri Lanka, Australia, Japan, Indonesia, Suriname, and Cuba.[190] Here, the bilateral nature of interest in the wreck makes it possible for both coastal and flag state to share a large division of its values, such as by creating schemes for joint recreation, research, education, and social enjoyment. It is also possible for the flag state – alleging some form of 'ownership' over the wreck – to readily compensate the coastal state for the leaked values when the wreck is threatened by economic development in the coastal state, such as by offering funding, training, collaboration, or other resources to incentivise the coastal state to preserve the wreck's values for the foreign state. As Manders said, often these MOUs incentivise coastal states by offering 'funding, training' and 'opportunities for future cooperation'.[191] This accords with Maes's response that such bilateral cooperation could include 'in situ

[187] Brockman, A., (2016), 'Exclusive: Named – The Salvage Company which Looted Jutland War Graves as MOD Fails to Act', *The Pipeline*, 22 May 2016, (at: http://thepipeline.info/blog/2016/05/22/exclusive-named-the-salvage-company-which-looted-jutland-war-graves-as-mod-fails-to-act/; accessed 1 May 2019); González, A.W., O'Keefe, P.J. and Williams, M., (2009), 'The UNESCO Convention on the Protection of the Underwater Cultural Heritage: A Future for our Past?', 11(1) *Conservation and Management of Archaeological Sites* 54-69, at p. 64 (per Williams); McCartney, I., (2017), 'The Battle of Jutland's Heritage Under Threat: Commercial Salvage on the Shipwrecks as Observed 2000 to 2016', 103(2) *The Mariner's Mirror* 196-204, at p. 204; Supra n. 123, Maarleveld.

[188] Manders, M., (2009), 'In Situ Preservation: The "Preferred Option"', 60(4) *Museum International* 31-41, at p. 32.

[189] 'There is cooperation, but it tends to be bilateral.' (Supra n. 180, Firth); Maes, F., (2018), Written Response of Frank Maes, 16 March 2018, Filed with Author; Supra n. 179, Aznar, at p. 94; Dromgoole, S., (2006), 'United Kingdom', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 344.

[190] Supra n. 180, Manders; Maarleveld, T.J., (2006), 'Netherlands', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 161-188, Martinus Nijhoff (Leiden), at p. 183.

[191] Supra n. 180, Manders.

scientific research, data exchange, knowledge sharing, state practice in policy and the implementation of the UNESCO Convention in national legislation.'[192]

This is an important purpose of the UNESCO Convention: to encourage the further negotiation of bilateral accords and MOUs and agreements between coastal and former flag states with a view to securing coastal state permission or engagement with the protection of such foreign wrecks.[193] As Manders said in interview, however, this compensation does not always work. For example, a common scenario is when coastal states find greater value in casting off the assertion of ownership of wrecks from a former colonial power.[194] Furthermore, much bilateral cooperation has been more concerned with the distribution of the spoils salvaged from wrecks, rather than focused on protection in situ or carrying out research compliant with the UNESCO Rules.[195] Most importantly of all, however, UCH which is of unknown provenience, or which is yet to be identified, or has yet to be discovered, will not be protected by such cases of bilateral cooperation, given that it only works for wreck sites of special interest and with a clear legal ownership by the flag state.

As such, bilateral cooperation only works in 'particular instances';[196] being predominantly naval warships of the past few centuries. In these cases, flag states possess an incentive to protect and conduct research on such wrecks, given that they have a strong cultural link to the vessel, accompanied by strong legal grounds to establish their right to capture the UCH's values. In the vast majority of cases, however, an identifiable wreck, with a flag state with sufficient resources, political incentive and a confident claim to exclusive legal ownership, is a rare occurrence. Most UCH values will remain unknown and, when they are known, they will more usually exude value, possess links or establish

[192] Supra n. 189, Maes.
[193] Supra n. 1, UNESCO Convention, Art. 6. See Chapter 7.
[194] Supra n. 180, Manders.
[195] For example, Kvalø and Marstrander refer to bilateral 'cooperation' between Holland and Norway relating to the *Ankerendum*, where the 'Norwegian authorities made a deal with Dutch authorities on how to split the valuable cargo.' (Kvalø, F. and Marstrander, L., (2006), 'Norway', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 217-228, Martinus Nijhoff (Leiden), at pp. 226-227). Also see the agreement between the UK and South Africa relating to the HMS *Birkenhead*, for example, where the two states seemed more preoccupied with ensuring that if the rumours turned out to be true about the large cache it was carrying of gold coins, then 'If any gold . . . were to be recovered [it] would be shared equally between our two Governments (United Kingdom and South Africa, (1989), *Exchange of letters constituting an agreement concerning the regulation of the terms of settlement of the salvaging of the wreck of HMS Birkenhead*, (adopted and in force, 22 September 1989 (Pretoria)), 1584 UNTS 321.
[196] The 'cooperation that happens . . . tends to be bilateral at the moment, over particular instances.' (Supra n. 180, Firth).

claims of interest for numerous communities – present and future – far outside a solitary 'flag state'.

UCH therefore continues to be poorly managed within a system which relies on the appointment of an exclusive sovereign to be responsible for investing in its protection, given its transnational character. As George Bass, the pre-eminent maritime archaeologist, said in 1983:

> 'Suggestions that antiquities found in international waters should belong to the country of historical or cultural origin are meaningless. If scholars cannot agree on the origins of the Cape Gelidonya wreck and its cargo, some holding that it is Syrian, others that it is Greek, and still others that it is either Cypriot or of mixed nationality, how could claims to modern ownership be argued in courts of law? Similarly, it is known that classical Greek statues were cast not only in what is modern Greece, but also in Italy, Asia Minor, and elsewhere. Would a unique bronze from far at sea belong to Greece, Italy, or Turkey today?'[197]

iii. The leaking of multiple values of UCH protection to external and future generations

The most critical risk to undervaluation of UCH protection is the non-excludable and non-rival character of UCH's multiple abstract values; in other words, viewing UCH as a global public good prone to compliance failure. It has been noted that a distinctive feature of multiple heritage values is their inimicality to market-based methods of valuation, given that their innate non-rivalry and non-excludability causes them to 'leak' multiple values which are lost as an externality to beneficiaries who receive the benefit of the good without paying the cost of production.[198] The resulting problem for UCH protection is that it is continually weighed up by national governments against other competing *national* interests, in a system where the national regulators are free to value national interests above those of 'external' interests who receive value from protecting UCH, including future generations.

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[197] Bass, G.F., (1980), 'Marine Archaeology: A Misunderstood Science', 2(1) *Ocean Yearbook* 137-152, at p. 151.

[198] Supra n. 45, Sandler; Supra n. 15, Cornes and Sandler, at pp. 483-535; Helm, D. (Ed.), (1991), *Economic Policy Towards the Environment*, Oxford University Press (Oxford); Sandler, T., (2004), *Global Collective Action*, Cambridge University Press (Cambridge).

As Flatman once put it, there is nothing within the LOSC or the UNESCO Convention 'to prevent or chastise a country wilfully damaging [UCH] within its own territorial seas or coastal zone whilst in the pursuit of other objectives'.[199] By comparison, states are perhaps less inclined to disregard cultural heritage found within their territorial sphere, such as buildings and monuments, where they can radiate the majority of their value – both tangible and intangible – to proximate local and national communities. Given this lack of return-on-investment for offshore or underwater marine goods, however, where the highly public nature of UCH causes its protection to produce numerous externalities to the present and future generations, states need to be motivated by *additional* incentives to fully invest in the provision of effective and meaningful legislation; or, in other words, there needs to be additional *political* or *economic* gains to incentivise such protection.

The compounding difficulty is that the investment by states in developing and implementing effective UCH policy is in constant competition with other public goods, such as the provision of health, defence, welfare, infrastructure, public safety, corporate protection, and so on, as well as with the sustainment of competing maritime sectors, such as shipping, fishing, dredging, construction, cable and pipe-laying, tourism, and offshore energy.[200] As a result, unless an especially strong economic or political case can be made out – taking into account that the allocation of effort and resources is likely to negatively impact all of these other competing opportunity costs to a national government – the protection of UCH remains permanently undervalued and prone to underproduction from the global perspective looking in.[201] As Dromgoole once summarised state motivation to protect UCH: '[w]hile the threat posed by such activities is manifest, the importance to national economies of commercial activities in the marine environment is such that any potential interference with them is a matter that is highly politically sensitive.'[202]

The unfortunate result is that examples of non-compliance with international commitments to protect UCH are so pervasive as to suggest such oft-repeated commitments between states are almost entirely meaningless. For example, Dromgoole refers to the prioritisation of economic advancement in Nigeria through the extraction of

[199] Supra n. 135, Flatman, at p. 186.
[200] Supra n. 131, Maarleveld, at p. 427.
[201] Lipe, W.D., (2009), 'Archaeological Values and Resource Management, in *Archaeology and Cultural Resource Management: Visions for the Future,* L. Sebastian and W.D. Lipe (Eds.), 41-64, School for Advanced Research (Santa Fe), at p. 61.
[202] Supra n. 3, Dromgoole, at p. 345.

crude oil from the Niger Delta, even though this development is known to severely threaten important submerged heritage relating to slave trade.[203] This is despite Nigeria ratifying the UNESCO Convention in 2005. As UNESCO has even said itself, despite commitments to protect UCH under the LOSC and in the Convention itself, a 'number of States offer no legal protection for their underwater cultural heritage, [and] even when such protection exists, gaps in the legislation and State sovereignty enable treasure hunters to pursue their activities and exploit artefacts'.[204] No more stark an example can be illustrated than that of Panama, who ratified and began implementing the UNESCO Convention in March 2003, only to then officially authorise a salvage operation to strip the *San José 1631* of its 51 tons of silver and bullion in the few months that followed.[205]

Well-resourced nations can be just as weak in terms of protection efforts. For example, the United Kingdom agreed to adopt the UNESCO Rules, before then entering into a salvage contract with treasure hunters to share the spoils of the HMS *Sussex*, the SS *Gairsoppa* and, later, the HMS *Victory* (1744).[206] Indeed, despite the adoption of the UK's Marine Policy Statement, which clearly calls for marine licensors to prioritise the protection of the historic environment in Section 2.6.6, the MMO still licensed the dredging of a UCH hotspot in the Goodwin Sands, despite significant public pressure and campaigning from NGOs.[207] UK policy has therefore even been described as an example of 'active neglect'.[208] Similarly, according to Guérin in interview, Canada, whose archaeological community were an important force driving the creation and negotiation of the UNESCO Convention, still cannot curtail treasure hunting in Nova Scotia.[209] As

[203] Supra n. 3, Dromgoole, at p. 345, n. 24; UNESCO, (2011), *Final Report of the Second Meeting of the Scientific and Technical Advisory Body established under the Convention*, 8 May 2011, UN Doc. UCH/11/2.STAB/220/7, at p. 4.
[204] Supra n. 157, UNESCO, at p. 10.
[205] UNESCO, (2015), *Report of the Mission to Panama (6-14 July and 21-29 October 2015) to Evaluate the Project Related to the Wreck of the San José*, 7 December 2015, Scientific and Technical Advisory Body for the Convention on the Protection of the Underwater Cultural Heritage (Paris), (at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/STAB-Panama-Report-EN-public.pdf; accessed: 18 December 2018); Supra n. 130, DeRudder and Maes, at p. 8 (per Aznar).
[206] 'The UK is declared that they will apply the Annex, but at the first occasion they apply something else. […] It would be better if you would ratify . . . and then you would be necessarily having to respect the 2001 Convention.' (Supra n. 122, Guérin); Dromgoole, S., (2004), 'Murky Waters for Government Policy: The Case of a 17th Century British Warship and 10 Tonnes of Gold Coins', 28(3) *Marine Policy* 189-198; Supra n.148, Gane and Martin.
[207] Supra n. 150.
[208] Supra n. 122, Gribble, Parham and Scott-Ireton, at p. 20 (per Parham).
[209] 'It is interesting. You know, Canada hasn't ratified the UNESCO Convention, but it was one of the most [supportive]. The President of ICUCH was Robert Grenier and he was one of the biggest fighters for [protection], while Canada has a lot of commercial salvaging companies going around.' (Supra n. 180, Manders); Canada is moving towards ratification, but 'there was some hindrance because Nova Scotia people were still treasure hunting' (supra n. 122, Guérin).

Williams responded in interview, 'signing up is one thing; implementing is another. And I don't see much evidence of implementation around the world.'[210] As Manders similarly responds, 'it's easy to say that you are going to ratify if you're not going to implement it.'[211] He continues by explaining that states were happy to accept the annexed Rules 'because they did no harm.' However, 'if you . . . *really* consider all the rules in there, it can cost you a lot of money.'[212]

This failure of implementation is a familiar story throughout all regions. For example, a PhD thesis submitted at the University of Southampton in 2018 uncovered various aspects of archaeological practice across the Adriatic Sea which were not compliant with the UNESCO Convention, despite all coastal states being party to the UNESCO Convention.[213] As Firth replied, although there is a long list of states who have now signed up the Convention, 'if you were to test whether they were following the provisions or not; if you were to look at treasure hunting and look at which ones have got inventories; which ones have got a named heritage service which has actually got maritime capabilities and so on; the sort of things at the back-end of the Convention which says . . . the things we should be doing, I imagine quite a few of them would struggle.'[214] For example, DeRudder evaluated Belgium's implementation of the Convention, after they joined in 2013, discovered that some key elements were still missing from Belgian law, such as rules on reporting finds, on consulting and cooperating with other states, and perhaps most disconcertingly, dealing with incidental destruction of UCH from regulated and unregulated activities.[215]

As Manders responds, there is a long list of states who have just signed up and not done any more than that.[216] He points to Panama as an example:

> 'The first ratifying country was Panama and a lot of ships are sailing under the flag of Panama. Even ships that have been accused of being commercial salvage ships. Well, I haven't heard of the Panamanian

[210] Supra n. 82, Williams.
[211] Supra n. 180, Manders.
[212] Supra n. 180, Manders.
[213] Supra n. 5, MacKintosh.
[214] Supra n. 180, Firth; 'You are supposed to notify the Secretariat about who is going to be your contact . . . once you have signed up. I think only one or two countries have done that. I think people are signing up as a statement of value, but in terms of implementation, I don't see it.' (Supra n. 82, Williams).
[215] Supra n. 130, DeRudder and Maes, at p. 74
[216] Supra n. 180, Manders.

> government doing something about that. Even worse, the archaeologist [who supported it] ended up in jail in Panama because the government officials said that he tricked them into the UNESCO Convention!'[217]

This is all the more concerning when one considers, as is explored in Chapter 5, that such states are frequently open registry states with the primary responsibility, in their capacity as 'flag states', for regulating many of the vessels operating freely across the ocean.

As Williams admits in interview:

> 'What I've come to realise . . . it's naïve really, but . . . my impression was that when a country signed up to a Convention – that was it. Everything was going to be done. Like a recipe! Then you realise that politicians sign up to things and they don't realise what they're signing. Civil servants are barely aware of it. And after two years, they move on and a successor comes in.'[218]

After giving an example of government lawyers dealing with the remaining *Mary Rose* structure who had not heard of the Valletta Convention, being the primary European convention for archaeological heritage, he continued:

> 'I am beginning to wonder whether the 2001 Convention is a classic example of . . . yes you can get people to sign up to it, but . . . if it's too technically complex and it's too controversial, people will stop there – at the time they signed up to it. And they won't do anything else with it.'[219]

(d) Difficulty Incentivising States to Comply through Sticks and Carrots

i. Ratification and compliance: a question of national 'net gain'

The realist-constructivist understanding of state motivation, as argued in Section 2 above, is therefore borne out with unfortunate accuracy when looking at worldwide protection of UCH by states. As Barbash-Riley says, even if the Dominican Republic did 'accept or ratify the 2001 Convention, [they] would still face the same temptation, due to lack of

[217] Supra n. 180, Manders.
[218] Supra n. 82, Williams; '[P]olicymakers are very rarely taking into account underwater archaeology and underwater cultural heritage because it's underwater and you don't ever see it…' (supra n. 122, Guérin).
[219] Supra n. 82, Williams.

funding and infrastructure, to give concessions to treasure hunters'.[220] Manders also concurs with this view that sees protection of UCH and compliance as a question of net gain for states, saying that parts of the Convention, such as the Annexed Rules, were accepted 'because [they] did no harm.'[221] In the same way, he responds, states had no issue ratifying the UNESCO 2003 Convention on the Protection of Intangible Cultural Heritage because there is no laws involved and it does not *cost* them anything.[222] The problems occur, he notes, when it comes to implementing rules that actually cost states money;[223] for example, the opportunity cost of developing commerce or exploiting natural resources across the EEZ or continental shelf.

This gets right to the heart of the sustainable development concept and the failure of that idealistic principle – requiring the balancing of long-term economic, social and ecological interests – to impact governmental decision-making.[224] The concept of 'sustainable development' has become unfortunately misconstrued and misinterpreted. It was intended to promote ecological and social concerns to be a trivariate part of the net gain calculus, eschewing the dominant focus of states upon solely economic (or political) gains; however, states to continue to freely prioritise internal values over external, such that sustainable development continues a paradigm whereby the natural and cultural environment is only protected when this *sustains* national economic growth. It has therefore even been misconstrued as requiring environmental conservation activities to be *economically sustainable* and to fit with a state's economic ambitions.[225] As Altvater responded, 'the reality is [that] policy is more looking into their economical side and there's still this gap between environmental . . . and the economical side. We're all saying we want to behave sustainably and bring all these three angles together, but in reality, economy seems to overrule the other values.'[226]

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[220] Supra n. 28, Barbash-Riley, at p. 226.
[221] Supra n. 180, Manders.
[222] Supra n. 180, Manders.
[223] Supra n. 180, Manders.
[224] Blewitt, J., (2017), *Understanding Sustainable Development*, 3rd Edn, Routledge (Abingdon); Slaper, T.F. and Hall, T.J., (2011), 'The Triple Bottom Line: What is it and How Does it Work?', 86(1) *Indiana Business Review* 4-8; Flint, R.W., (2013), *Practice of Sustainable Community Development: A Participatory Framework for Change*, Springer (New York), at pp. 27-37; World Commission on Environment and Development, (1987), *Our Common Future*, Oxford University Press (Oxford).
[225] Supra n.148, Gane and Martin; '[Y]ou have to think in this way. Maybe the sustainable perspective, you have to conserve of course, you have to make sure it's ecological, but you also have to see is there some kind of potential for generating money for the local inhabitants or like maybe the region to get more tourists.' (Ooms, E., (2018), Interview with Erik Ooms, 27 February 2018, Transcript on File).
[226] Altvater, S., (2018), Interview with Susanne Altvater, 17 May 2018), Transcript on File.

ii. Economic and political motivations to protect UCH

The question therefore becomes the extent to which international architecture can incentivise states to protect UCH in lieu of economic gains. Turning first to the *economic* justification for protecting UCH, the critical issue as noted is that in situ UCH is really only "valuable" for its intangible and non-marketable qualities, which leak value to free riders, future generations and transnational communities, rather than any economic value for the nation states required to invest in its protection. This lack of economic incentive is even stronger the further the UCH is from the shore; while it is feasible that UCH found within a few miles of shore may deliver *some* economic benefit; effectively monetising a wreck site located many hundreds of miles offshore or in another state's waters is near-fantasy for the foreseeable future. Arguments by the heritage community about the potential economic value of UCH sites through dive tourism often appear weak and very difficult to make persuasively, especially further offshore.[227] In other words, beyond its multiple intangible values which are usually impossible or inefficient to capture, the only real incentive to protect such distant wrecks is the potential political currency in that strategy to a particular government. As Ooms responded, in order to make changes one ultimately needs 'the political support', but the difficulty is that each state 'is negotiating in its own interest'.[228]

Locating a *political* incentive to allot public resources and energy towards the protection of UCH, when conflicting with more immediate political priorities of national governments, is also an uphill battle. Political action ex ante destruction is rarely a justifiable expense for governments. Indeed, all too often, UCH protection is viewed as a worthwhile pursuit, but a politically expendable recreational or academic pastime among a niche community of enthusiasts.[229] Only occasionally can the political case be made. For example, in relation to naval warships (counter-productively serving to strengthen nationalistic narratives),[230] or for sites of world-famous disasters, which demand universal political motivation and are easily undermined by free riding and non-compliance by third states.[231] Furthermore, some states can possess a strong political

[227] Cater, E., (2003), 'Between the Devil and the Deep Blue Sea: Dilemmas for Marine Ecotourism', in *Marine Ecotourism: Issues and Experiences*, B. Garrod and J. Wilson (Eds), 37-47, Channel View Publications (Bristol); Nicholson, S.R., (1997), 'Mutiny as to the Bounty: International Law's Failing Preservation Efforts Regarding Shipwrecks and Their Artifacts Located in International Waters', 66(1) *UMKC Law Review* 135-168.
[228] Supra n. 225, Ooms.
[229] Supra n. 180, Manders.
[230] Supra n. 180, Firth.
[231] For example, the M/S Estonia Agreement and the Titanic Agreement (Överenskommelse med Estland och Finland om m/s Estonia 1995: SÖ: 36 (Swedish Ministry for Foreign Affairs, Tallinn, 23 February

incentive to preserve their historical or cultural record, such as Italy, Greece, and France, who have a strong tradition in investing in the protection of their cultural heritage, including maritime heritage.[232] Far more often, however, political motivation has become corrupted and antithetical to preservationism. For example, a large number of wrecks have only been forcefully protected on account of their extractive economic value, with many others being studied with a focus on establishing historic territorial claims, such as in the South China Sea.[233]

Not only does UCH protection compete with other political or economic gains for states, but it faces an uphill battle for dwindling public resources with other global public goods, such as the socioeconomic gains from expanding renewable energy through the construction of wind farms.[234] As Flatman has said, 'there appears to be a "resource hierarchy" [in marine governance] comprising: aggregates, hydrocarbons, . . . fish stocks, environment and heritage.'[235] Adding that heritage 'comes both last and most definitely least in this hierarchy'.[236] Similarly, Firth responds, '[i]t's fairly typical that cultural heritage falls completely out of anyone's mix in any ocean management, you know, it rarely gets a mention. So that's kind of an ongoing problem'.[237] Its out-of-sight nature means it even ranks below land-based cultural heritage.[238] Many concur with this view that UCH is low on the political agenda and, combined with its global public good nature, the outlook in the present climate for UCH threatened by offshore economic activity looks

1995) [Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia]; Bureau of Oceans and International Environmental and Scientific Affairs, (2004), Agreement Concerning the Shipwrecked Vessel RMS Titanic, (adopted 18 June 2004, not yet in force), (at: http://www.gc.noaa.gov/documents/titanic-agreement.pdf; accessed 18 December 2018)).

[232] 'Some more concerned states with cultural heritage at large, and UCH in particular, are doing things quite well.' (Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File).

[233] Supra n. 180, Manders; Supra n. 180, Firth; Erickson, A.S. and Bond, K., (2015), 'Archaeology and the South China Sea', 20 July 2015, *The Diplomat*, (at: https://thediplomat.com/2015/07/archaeology-and-the-south-china-sea/; accessed 20 December 2018).

[234] Supra n. 135, Flatman; Flatman, J., (2009), 'Conserving Marine Cultural Heritage: Threats, Risks and Future Priorities', 11(1) *Conservation and Management of Archaeological Sites* 5-8, at p. 6; Supra n. 140, Evans, Firth and Staniforth, at p. 49 (per Staniforth).

[235] Flatman, J., (2006), 'The Origins and Ethics of Maritime Archaeology – Part II', 6(3) *Public Archaeology* 141-154, at p. 144.

[236] Ibid.

[237] Supra n. 180, Firth; UCH 'does not have the priority or the profile that environmental issues have.' (Supra n. 82, Williams); Supra n. 234, Flatman, at p. 7.

[238] Scovazzi, T., (2014), 'Underwater Cultural Heritage as an International Common Good', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 215-230, Hart (Oxford), at pp. 215-216; Supra n. 135, Flatman, at p. 169; 'You know it's sad, but [be] like you are on land. Land heritage is a priority in the management of all kind of spaces. You have to do this in the water as well.' (Supra n. 122, Guérin).

bleak.[239] As Guérin said in interview, when looking at the amount of money being invested into protecting the ocean:

> 'you agree that this is nothing. So, how much is going to underwater archaeology? Even less than nothing? [The international community is talking] about protecting the offshore environment, but cultural heritage is a largely neglected aspect.'[240]

A solution might lie in increasing public awareness and public enjoyment of UCH's values, so as to shift the political and economic incentives of governments.[241] However, as a global public good, the same issue arises that strong political incentive only appears in the discovery of destruction after-the-event, when there is usually significant media attention.[242] The difficulty, as Gribble once described it, is that we have a 'vicious cycle of fail'; whereby a lack of investment into UCH recreation, research and enjoyment, equates to less of the public being aware of the value and plight of UCH, which in turn lowers the funding available for its enjoyment and discovery.[243] This is all tied up in the concept of "seablindness", to which Firth and Williams both referred, which evokes how the general public are not engaged with the value of the ocean and how these values are under continuous threat. As Firth points out, interestingly, UCH actually has the opportunity to change this common perspective and to ignite the public's awareness of the value and importance of the ocean, provided that it is consumed appropriately.[244]

iii. Difficulty incentivising states to protect UCH by 'sticks' and 'carrots'

While Article 17 of the UNESCO Convention requires states to impose sanctions on those citizens who breach the rules, as Sarid says, 'these sanctions are directed at inner-jurisdiction enforcement';[245] i.e., states are free to decide how or whether to punish their own citizens.[246] As a result, Sarid rightly notes, the Convention has some difficulties in terms of ensuring enforcement, instead relying on self-enforcement and power dynamics

[239] Supra n. 135, Flatman; Supra n. 82, Williams; Supra n. 180, Firth.
[240] Supra n. 122, Guérin.
[241] Supra n. 122, Gribble, Parham and Scott-Ireton, at p. 21; Supra n. 135, Flatman, at p. 169; Supra n. 82, Williams; Supra n. 122, Guérin.
[242] Supra n. 180, Firth.
[243] Supra n. 122, Gribble, Parham and Scott-Ireton, at p. 23 (per Gribble); Supra n. 82, Williams.
[244] Supra n. 180, Firth.
[245] Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261, at p. 256.
[246] See Chapter 6.

between states.[247] Guérin defends this state of affairs in interview, saying that compliance 'is always a question'.[248] 'Every law has to be implemented', she says, 'and there will always be a question about how we will implement it.'[249] UNESCO (and the MOP and STAB) might help states with ideas and inspiration at regional conferences, but at the more official meetings:

> 'It's not about training anyone and to say like "Oh you haven't…" Everyone does their best effort and ratification already indicated the state wants to be very seriously doing better. So, it's more about going your way together, than putting someone against a wall and saying "Well, you should…", you know.'[250]

For example, she remarks, an important motivation for limiting the membership of technical experts in the STAB to only those appointed by states parties was intended to motivate non-ratifying states to sign up and take part.[251] This is both a stick and a carrot, in that it punishes non-party states for failing to be a part of the club and provides a positive incentive to join.

Defenders of the present system might therefore argue that ratification is only the first stage in the process and that it is after joining up that states then subsequently develop their legal rules and enhance standards of implementation, without the need for punitive measures.[252] Indeed, it is often an issue of resource-deficiency and regulatory capacity of states which largely causes an inability to comply with international law, rather than a lack of motivation.[253] A problem just as central to compliance with UCH protection

[247] Supra n. 245, Sarid, at pp. 256 and 258; Supra n. 93, Brunnée and Toope, S., (2002), 'Persuasion and Enforcement'.
[248] Supra n. 122, Guérin.
[249] Supra n. 122, Guérin.
[250] Supra n. 122, Guérin.
[251] Supra n. 122, Guérin.
[252] 'Ratification is the beginning and not an end in itself for the Convention.' (Supra n. 122, Guérin); 'It's often the case with conventions that they're sort of aspirational. They want to have those aspirations out there, so that people know where they should be heading even if they can't quite...' (Supra n. 180, Firth); Cooperation will be achievable, 'but it will take time and of course after states have implemented UNESCO 2001.' (Supra n. 189, Maes); 'As for your suggestion to have more intense cooperation, this is a more step-by-step approach.' (Supra n. 225, Ooms); 'The 2001 UNESCO Convention, although important, is just a first step. It establishes the minimum threshold of protection as well as the lower level of cooperation. States and the rest of stakeholders must explore new cooperative tools.' (Supra n. 232, Aznar).
[253] Supra n. 74, Nollkaemper, at p. 175; Louka, E., (1996), 'Cutting the Gordian Knot: Why International Environmental Law Is Not Only About the Protection of the Environment', 10(1) *Temple International and Comparative Law Journal* 79-122; Shihata, I.F.I., (1996), 'Implementation, Enforcement, and Compliance with International Environmental Agreements – Practical Suggestions in Light of the World Bank's Experience', 9(1) *Georgetown International Environmental Law Review* 37-52; Stone, C.D., (2004),

law.[254] They therefore argue that compliance will be driven up once these states are given a greater level of capacity to implement UCH policy.[255] Dromgoole even implies that Article 2(4) of the UNESCO Convention limits the responsibility of states so that 'they need only use' the best practicable means at their disposal, thus appearing to excuse poor compliance on account of state capacity.[256] These authors see that the role of UNESCO and of the MOP is predominantly to facilitate progression to higher standards by capacity building, training, and enhancing public awareness.[257] For many, therefore, the duty of cooperation is a duty to share resources and expand the capacity of underdeveloped states to undertake protection of UCH.[258] This fits with Klabbers's remarks that, while internal compliance procedures within treaty regimes carry the same interpretation and enforcement challenges as traditional state responsibility models, they provide facilitative support and resource pooling to help states to avoid non-compliance ex post ratification.[259]

As such, the incentives offered by flag states to coastal states with a view to securing cooperation,[260] as well as the support, networking and training offered by UNESCO in exchange for better compliance for states parties, can all be likened to a 'carrot' form of incentive, to encourage state compliance among states and to compensate them for global protection.[261] However, is post-ratification capacity building alone sufficient? While this incentivisation might help address the specific issue areas or UCH sites targeted, the vast majority of legal systems and communities within them still continue to fail in the

'Common but Differentiated Responsibilities in International Law', 98(2) *American Journal of International Law* 276-301; Tay, S.S.C., (1999), 'Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development', 11(2) *Georgetown International Environmental Law Review* 241-306.

[254] Supra n. 122, Guérin; Supra n. 180, Manders; Supra n. 5, MacKintosh; Gribble, J. and Forrest, C., (2006), 'Underwater Cultural Heritage at Risk: The Case of the Dodington Coins', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 313-324, Cambridge University Press (Cambridge), at p. 316;

[255] Supra n. 122, Guérin; Supra n. 180, Manders; Supra n. 159, Aznar, at p. 288.

[256] Supra n. 3, Dromgoole, at p. 310.

[257] Supra n. 122, Guérin.

[258] The 'transfer of knowledge and the collaboration in research tasks are basic tools for an effective preservation of UCH. […] Depending on their respective domestic legislations. Some more 'concerned' states with cultural heritage at large, and UCH in particular, are doing things quite well. Some others still don't know how to address these questions. This is why international cooperation – both at diplomatic and scientific levels – is so important.' (Supra n. 232, Aznar); Supra n. 158, Carducci, at p. 426; UNESCO, (1997), *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage*, Executive Board, 151st Session, (12 March 1997, Paris), UN Doc. 151 EX/10, Annex I, at para. 43.

[259] Supra n. 63, Klabbers, at p. 1003.

[260] Supra n. 180, Manders.

[261] O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at pp. 158-159.

protection of UCH. For example, despite concerted efforts at UNESCO to engage states and communities with UCH protection in South East Asia through various capacity building initiatives,[262] news headlines continue to relay the increasingly systematic and ruthless stripping of metal and objects from warships representing large war graves.[263] Furthermore, while he reserved praise for the UNESCO Convention and the concept of capacity building, Firth acknowledged that it is an open question whether capacity building and networking would have happened anyway, without the UNESCO Convention.[264] As Williams also responded, UNESCO are only capacity building 'in terms of educating a few people. You're not getting the changes in national legislation.'[265]

Indeed, the benefits of capacity building are brought into focus when one considers that poor implementation and compliance with commitments to protect UCH are witnessed just as strongly across Europe and in more developed regions of the world.[266] What is more, capacity building has been suggested to be an effective means of only addressing what are known as *weakest link* goods,[267] which in this case would include specific targeting of wreck looting or criminal activity, but may be less effective for *aggregate-effort* goods – such as a global prioritisation of UCH protection over the short-term strategy of maximising economic expansion – which require extensive multilateral restrictions and are much more prone to free riding.[268] As Downs and Trento,[269] as well as Brown Weiss and Jacobsen,[270] have each proposed therefore, perhaps we should understand compliance in its many complexities as including questions *both* of capacity

[262] Supra n. 122, Guérin; Favis, R.L., Manders, M. and Underwood, C., (2012), *Introduction: Development of the Regional Capacity Building Programme on Underwater Cultural Heritage*, UNESCO Bangkok (Bangkok).
[263] Supra n. 245, Sarid, at p. 249; Holmes, O., (2016), 'Mystery as wrecks of three Dutch WWII ships vanish from Java seabed', 16 November 2016, *The Guardian*, (at: https://www.theguardian.com/world/2016/nov/16/three-dutch-second-world-war-shipwrecks-vanish-java-sea-indonesia; accessed 20 December 2018); Lamb, K., (2018), 'Lost bones, a mass grave and war wrecks plundered off Indonesia', 28 February 2018, *The Guardian*, (at: https://www.theguardian.com/world/2018/feb/28/bones-mass-grave-british-war-wrecks-java-indonesia; accessed 20 December 2018); Holmes, O., Ulmanu, M. and Roberts, S., (2017), 'The world's biggest grave robbery: Asia's disappearing WWII shipwrecks', 3 November 2017, *The Guardian*, (at: https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks; accessed: 20 December 2018).
[264] Supra n. 180, Firth.
[265] Supra n. 82, Williams.
[266] Supra n. 123, Maarleveld; Supra n. 82, Williams.
[267] Supra n. 18, Bodansky, at pp. 661-662.
[268] Supra n. 9, Kaul, Grunberg and Stern, at p. 487; Supra n. 9, Barrett, at p. 6; Supra n. 75, Downs and Trento, at p. 20.
[269] Supra n. 75, Downs and Trento, at p. 32.
[270] Jacobson, H.K. and Brown Weiss, E., (1998), 'Assessing the Record and Designing Strategies to Engage Countries', in *Engaging Countries: Strengthening Compliance with International Environmental Accords*, E. Brown Weiss and H.K. Jacobson (Eds.), 511-554, MIT Press (Cambridge MA).

and rational bargaining.[271] In other words, the emphasis on capacity building and education by the MOP and UNESCO is certainly likely to have positive long-term effects. However, it is unlikely to be sufficient to swiftly protect an endangered and non-renewable resource, particularly when its protection will lose in the competition for other national economic objectives, for many decades to come.

All of the evidence above confirms that the question of treaty membership and compliance once within the treaty will continue to be a question of net political gain. As Manders made clear in his response, ratification is a question of what states actually stand to gain by taking part.[272] As he saw it, there were benefits for the Netherlands in ratifying, particularly on account of participation and leadership on matters of UCH policy and practice within the MOP and STAB, as well as the improved framework for bilateral cooperation.[273] Both Manders and Guérin therefore recognised that effective compliance is a two-way issue and a matter of incentivising states. As Guérin responded, as a state government you will always 'invest in where you see your profit' and 'if you force the states to protect better the heritage you also have to show them what advantages there are in doing it.'[274] As Brockman reported in 2016, the ambivalent response of the UK government to the issue of unregulated salvage and looting of the vast war graves left after the Battle of Jutland was 'code for "It's too difficult and expensive." The only exception to this policy of promising action while actually doing nothing appears to be if the Government begins to be subjected to some uncomfortable headlines in the press.'[275] Krumholz and Brennan similarly remarked in 2015 that when it comes to states deciding between UCH protection and other economic or political uses of resources, 'it becomes a difficult proposition to suggest restricting or eliminating [other] uses to protect resources that are hidden from the public eye.'[276]

Regardless of post-ratification support, therefore, and regardless of whether states are parties or not to the UNESCO or LOSC legal frameworks for protecting UCH, it appears likely that they will continue to weigh up the benefits of protection based on its relative economic or political gain to themselves qua independent sovereign states.

[271] Ibid, Jacobson and Brown Weiss; Supra n. 75, Downs and Trento, at p. 32.
[272] Supra n. 180, Manders.
[273] Supra n. 180, Manders.
[274] Supra n. 122, Guérin.
[275] Supra n. 187, Brockman.
[276] Krumholz, J.S. and Brennan, M.L., (2015), 'Fishing for Common Ground: Investigations of the Impact of Trawling on Ancient Shipwreck Sites Uncovers a Potential for Management Synergy', 61 *Marine Policy* 127-133, at p. 128.

Unfortunately, as has been clearly demonstrated from evidence around the world, the global public good nature of environmental and cultural heritage protection therefore makes them an activity with a weak return-on-investment for national governments seeking political or economic gain.

4. Conclusion: Difficulty Showing Net Political Gain from Protecting Heritage

This chapter has provided evidence – both documentary and empirical through interviews with experts – that the pessimistic accounts of legal realists and of rational choice theory appear to be borne out by the reality. While post-ratification capacity building and the enhanced opportunities for collaboration may provide some additional 'carrot' form of incentive for states to ratify the Convention, ultimately, the decision to ratify, as well as the more important day-to-day policy decisions relating to UCH management and protection, all remain a matter of state choice. However, when making such decisions which impact upon the preservation of global values, sovereign states are concerned solely with serving their sovereign interests and are disinclined to invest in global public goods given their propensity to externalities, free riding and poor collective action. Furthermore, whether post-ratification support and encouragement is sufficient to protect immediately threatened, fragile and non-renewable resources, which continue to be destroyed or damaged throughout the world, appears doubtful.

This drives forward the present search for new forms of governance that address the shortage of global public goods provided by traditional international law, as examined in Chapters 6 to 9.[277] The reality appears to be a question of achieving sufficient collective action, such that the gains from free riding are outweighed by the collective gains from having a regulatory system which provides for more accurate and fair allocation of responsibility, compensation and coordination. To address this routine shortfall in state motivation to protect UCH through consent-based law, therefore, there are perhaps three key strategies.

The first is to continue the horizontal public international law paradigm. However, as argued above and will be evidenced in Chapter 5, while this may eventually – through constructive dialogue and gradual patterns of conflict and contestation – bring the international order towards sufficient collective action on some specific issues, it has

[277] Supra n. 57, Cafaggi and Caron.

demonstrated itself as particularly poor at managing global public goods and at protecting natural and cultural heritage ex ante degradation and destruction.

Second, is the development of more impactful treaties at a smaller – regional or subregional – level. As is argued in Chapter 7, there are considerable collective gains to be made and a much lower threshold of state participation and compliance needed before states reach the critical mass of collective action required. Such regional legislation can not only ensure more detailed rules on cooperation, collaboration and the more effective integration of regional actors, but it can even provide supranational, i.e., sovereignty-constraining, controls. As such, the misallocation between producers and consumers of UCH protection being better aligned, the weaknesses caused by regulatory fragmentation being resolved through harmonisation, and the expanded ability for shared regional enjoyment of protected UCH, all makes a more convincing case for the slight diminution in national output within regional frameworks.

The final strategy is the expansion of the role of the transnational community within and without the state at multiple levels. As is also explored across Chapters 6 to 9, this might additionally include the utilisation of private actors and resources through public-private partnerships, as well as the use of transnational community regulation, which can all alleviate the burden on governments, provide them with additional motivations or resources, or even side-step their sovereign political interests altogether.

Chapter 5

International Law and the UNESCO Convention

Chapter Abstract:

This is the final chapter examining the critical challenges of relying on the national-international paradigm to protect underwater cultural heritage (UCH), which follows from the evaluation of issues surrounding international cooperation and international compliance in Chapters 3 and 4, respectively. After first introducing international demands for a new approach to governing the ocean environment, this chapter explores the concepts and meanings of transnational law as a system promoting the growing use of actors and norms without the exclusive reliance on Westphalian sovereignty. It then draws together some of the key traits of national sovereignty – absolutism, equality and territoriality – to provide an argument that the Westphalian (national-level) approach carries various weaknesses which make it an uncomfortable and ineffective system of regulation in the transnational ocean environment. It argues that the poor protection of UCH within the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention)[1] and within the UN 1982 Convention on the Law of the Sea (LOSC)[2] is largely a product of this struggling Westphalian order. This leads to Chapters 6 to 9 which then explore whether additional systems which expand above and below the Westphalian paradigm could help address the protection of the marine historic environment.

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.

[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.

1. Addressing the Legal *System*; Not Just the Legal *Rules*

The law of the sea is under strain. Wherever one looks, whether it be ecosystem damage and biodiversity decimation,[3] overfishing,[4] seabed trawling,[5] coral destruction,[6] human rights abuses,[7] human trafficking,[8] piracy,[9] smuggling,[10] crime,[11] wreck looting,[12] noise

[3] UNESCO, (2016), 'Facts and Figures on Marine Biodiversity', UNESCO (Paris), (at: http://www.unesco.org/new/en/natural-sciences/ioc-oceans/focus-areas/rio-20-ocean/blueprint-for-the-future-we-want/marine-biodiversity/facts-and-figures-on-marine-biodiversity/; accessed 2 January 2019).

[4] Food and Agricultural Organization, (2018), *The State of the World Fisheries and Aquaculture 2018: Meeting the Sustainable Development Goals*, Food and Agricultural Organization (Rome), (at: http://www.fao.org/3/I9540EN/i9540en.pdf; accessed 2 January 2019); Clover, C., (2005), *The End Of The Line: How Overfishing Is Changing the World and What We Eat*, Ebury Press (London); Serdy, A., (2016), *The New Entrants Problem in International Fisheries Law*, Cambridge University Press (Cambridge); Riddle, K.W., (2006), 'Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious?', 37 *Ocean Development and International Law* 265-297; Sumaila, U.R., Alder, J. and Keith, H., (2006), 'Global Scope and Economics of Illegal Fishing', 30(6) *Marine Policy* 696-703; Heller, P., (2017), *The Whale Warriors: The Battle at the Bottom of the World to Save the Planet's Largest Mammals*, Free Press (New York).

[5] WWF, (2007), *Position Paper: Bottom Trawling*, WWF International (Gland), (at: http://www.wwf.se/source.php/1155231/WWF%20bottom%20trawling%20position%20statement%20Nov%202007.pdf; accessed 2 January 2019); Rijnsdorp, A. D., Bastardie, F., Bolam, S.G., Buhl-Mortensen, L., Eigaard, O.R., Hamon, K.G. and Hiddink, J.G., Hintzen, N.T., Ivanović, A., Kenny, A. and Laffargue, P., (2015), 'Towards a Framework for the Quantitative Assessment of Trawling Impact on the Seabed and Benthic Ecosystem', 73(1) *ICES Journal of Marine Science* 127-138.

[6] Folke, C., (1999), 'Ecological Goods and Services of Coral Reef Ecosystems', 29(2) *Ecological Economics* 215-233; Mumby, P.J. and Steneck, R.S., (2008), 'Coral Reef Management and Conservation in Light of Rapidly Evolving Ecological Paradigms', 23(10) *Trends in Ecology & Evolution* 555-563.

[7] Human Rights at Sea, (2018), *Human Rights at Sea Annual Report – Year Four: Global Delivery of Maritime Human Rights*, Human Rights at Sea (Havant), (at: https://www.humanrightsatsea.org/wp-content/uploads/2018/10/HRAS-Annual-Report-2017-2018-Year-4.pdf; accessed 2 January 2019); Couper, A.D., (1999), *Voyages of Abuse: Seafarers, Human Rights and International Shipping*, Pluto Press (London).

[8] Gallagher, A.T. and David, F., (2016), *The International Law of Migrant Smuggling*, Cambridge University Press (Cambridge); Surtees, R., (2013), 'Trapped at Sea: Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers', 1(2) *Groningen Journal of International Law* 91-151; Mallia, P., (2010), *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security Through the Creation of a Cooperative Framework*, Martinus Nijhoff (Leiden).

[9] Mejia, M.Q., Kojima, C. and Sawyer, M. (Eds.), (2016), *Piracy at Sea*, Springer (New York); Kraska, J., (2011), *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea*, Praeger (Santa Barbara); Struett, M.J., Carlson, J.D. and Nance, M.T. (Eds.), (2014), *Maritime Piracy and the Construction of Global Governance*, Routledge (Abingdon).

[10] Delicato, V., (2010), *Maritime Security and the Fight Against Drug Trafficking in the Mediterranean and Atlantic Approaches*, Mediterranean Paper Series, September 2010, The German Marshall Fund of the United States (Washington DC); Fritch, C.R., (2009), 'Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction Over the Illicit Narcotics Trade and the Ninth Circuit's Unnecessary Nexus Requirement', 8(4) *Washington University Global Studies Law Review* 701-721.

[11] E.D., Papastavridis, (2014), *Crimes at Sea: A Law of the Sea Perspective*, Brill (Leiden); Roach, J.A., (2004), 'Initiatives to Enhance Maritime Security at Sea', 28(1) *Marine Policy* 41-66; UNODC, (2013), *Combating Transnational Organized Crime Committed at Sea: Issue Paper*, United Nations Office for Drugs and Crime (Vienna) (at https://www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf; accessed 2 January 2019); Couper, A., Smith, H.D. and Ciceri, B., (2015), *Fishers and Plunderers: Theft, Slavery and Violence at Sea*, Pluto Press (London).

[12] See Chapter 1, Section 3.

pollution,[13] land-based pollution,[14] vessel-source pollution,[15] health and safety failures,[16] or major maritime disasters;[17] one can witness recurring deficiencies in regulatory oversight.[18] Considering the ocean's incalculable ecological, social, economic and cultural value, this increasing visibility of poor regulatory management has led to a recent proliferation of inter-governmental and non-governmental organisations dedicated to improving our protection of the seas, as well as to a growing number of international and

[13] Brown, E., (2015), 'Marine Life Needs Protection from Noise Pollution', 14 September 2015, *Scientific American*, (at: https://www.scientificamerican.com/article/marine-life-needs-protection-from-noise-pollution/; accessed 2 January 2019); Gillespie, A., (2011), 'Noise Pollution, the Oceans, and the Limits of International Law', 21(1) *Yearbook of International Environmental Law* 114–139; Doringa, H.M. and Oude Elferink, A.G., (2000), 'Acoustic Pollution in the Oceans: The Search for Legal Standards', 31(1-2) *Ocean Development and International Law* 151-182, at pp. 158-159; Scott, K., (2004), 'International Regulation of Undersea Noise', 53(2) *International and Comparative Law Quarterly* 287-324.

[14] Derraik, J.G.B., (2002), 'The Pollution of the Marine Environment by Plastic Debris: A Review', 44(9) *Marine Pollution Bulletin* 842-852; UNEP, (2006), *Protecting Coastal and Marine Environments from Land-based Activities: A Guide for National Action*, United Nations Environment Programme (Nairobi); GESAMP, (2001), *Protecting the Ocean from Land-based Activities*, Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, Reports and Studies No. 71, United Nations Environment Programme (Nairobi) (at: http://www.jodc.go.jp/info/ioc_doc/GESAMP/report71.pdf; accessed 2 January 2009); Tanaka, Y., (2006), 'Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis between Global and Regional Legal Frameworks', 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 535-574; STAP, (2011), *Marine Debris as a Global Environmental Problem: Introducing a Solutions-Based Framework Focused on Plastic*, Global Environment Facility (Washington DC), (at: http://www.stapgef.org/sites/default/files/stap/wp-content/uploads/2013/05/Marine-Debris.pdf; accessed 2 January 2009).

[15] Weis, J.S., (2014), *Marine Pollution: What Everyone Needs to Know*, Oxford University Press (Oxford); GESAMP, (2009), *Pollution in the Open Oceans: A Review of Assessments and Related Studies*, UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, Reports and Studies No. 79, United Nations Environment Programme (Nairobi), (at: http://www.gesamp.org/site/assets/files/1261/pollution-in-the-open-oceans-a-review-of-assessments-and-related-studies-en.pdf; accessed 2 January 2009).

[16] Lavelle, J. (Ed.), (2011), *The Maritime Labour Convention 2006: International Labour Law Redefined*, Routledge (Abingdon); Ek, Å., Runefors, M. and Borell, J., (2014), 'Relationships Between Safety Culture Aspects – A Work Process to Enable Interpretation', 44 *Marine Policy* 179-186; Hayashi, M., (2001), 'Toward the Elimination of Substandard Shipping: The Report of the International Commission on Shipping', 16(3) *International Journal of Marine and Coastal Law* 501-507.

[17] Bejan, R., (2010), 'Research Regarding the Causes of Disasters to Oil Tankers in Order to Enhance Maritime Safety', 2(2) *Maritime Transport & Navigation Journal* 45-48; Lawson, C.T. and Weisbrod, R.E., (2005), 'Ferry Transport: The Realm of Responsibility for Ferry Disasters in Developing Nations', 8(4) *Journal of Public Transportation* 17-31; Vinogradov, S., (2013), 'The Impact of the Deepwater Horizon: The Evolving International Legal Regime for Offshore Accidental Pollution Prevention, Preparedness, and Response', 44(4) *Ocean Development & International Law* 335-362.

[18] For example, see Langewiesche, T., (2005), *The Outlaw Sea: A World of Freedom, Chaos and Crime*, North Point Press (New York); D'Orso, M. and Danson, T., (2011), *Oceana*, Rodale Press (New York); Gjerde, K.M., Dotinga, H., Hart, S., Molenaar, E.J., Rayfuse, R. and Warner, R., (2008), *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, IUCN Environmental Policy and Law Papers online – Marine Series No. 1, IUCN (Gland) (at: https://cmsdata.iucn.org/downloads/iucn_marine_paper_1_2.pdf; accessed 2 January 2019); Urbina, I., (2015), 'The Outlaw Ocean – Series', 21 July 2015, *The New York Times*, (at: https://www.nytimes.com/interactive/2015/07/24/world/the-outlaw-ocean.html; accessed 2 January 2019); Halpern, B.S., Walbridge, S., Selkoe, K.A., Kappel, C.V., Micheli, F., D'Agrosa, C., Bruno, J.F., Casey, K.S., Ebert, C., Fox, H.E., Fujita, R., Heinemann, D., Lenihan, H.S., Madin, E.M.P., Perry, M.T., Selig, E.R., Spalding, M., Steneck, R., Watson, R., (2008), 'A Global Map of Human Impact on Marine Ecosystems', 319(5865) *Science* 948-952; Ramirez-Llodra, E., Tyler, P.A., Baker, M.C., Bergstad, O.A., Clark, M.R., Escobar, E., Levin, L.A., Menot, L., Rowden, A.A., Smith, C.R. and Van Dover C.L., (2011), 'Man and the Last Great Wilderness: Human Impact on the Deep Sea', 6(7) *PLoS One* 22588.

regional regimes, conferences, policy networks, and funds. For example, a report published by an international committee of experts in 2001 submitted that, at the turn of the twentieth century, 'the state of the world's seas and oceans is deteriorating [and] most of the problems identified decades ago have not been resolved, and many are worsening'.[19]

Things still have not changed today. As Harrison said in 2017, 'as the twentieth century progressed, the rapid industrialization of the oceans has meant that any lingering belief that the seas were "inexhaustible" gave way to a growing sense of crisis. This trend has continued to the extent that, today, there are warning signs that the oceans are at tipping point, owing to the impacts of pollution and other environmental stresses caused by anthropogenic activity.'[20] In 2015, Scott wrote that despite 'many treaties relating to the marine environment [being] in place for half a century or more, the health of the oceans globally continues to be significantly degraded by human activities.'[21] Similarly, in 2016, Sumaila et al referred to the 'declining state of the world's oceans [which] has now been an item on the global agenda for many years, but the efforts of the international system at cooperation . . . have not delivered results strong enough to restore ocean health.'[22]

This has led to calls from every corner of the international community to transform our approach to ocean management away from the traditional "zonal" system of ocean management, towards a system which is more integrated and inclusive.[23] The development of such 'Integrated Ocean Management' (IOM) processes, in various forms, can be increasingly witnessed at each the local, national, regional and global scales.[24] For example, as a region which is presently regarded as a leader in the development of effective marine policy, the European Union has worked towards the achievement of

[19] GESAMP, (2001), *A Sea of Trouble*s, UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, Reports and Studies No. 70, United Nations Environment Programme (Nairobi), (at: http://www.gesamp.org/site/assets/files/1250/a-sea-of-troubles-en.pdf; accessed 2 January 2019), at p. 1.
[20] Harrison, J., (2017), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press (Oxford), at p. 1.
[21] Scott, K.N., (2015), 'Integrated Oceans Management: A New Frontier in Marine Environmental Protection', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 463-490, Oxford University Press (Oxford), at p. 463.
[22] Sumaila, U.R., Bellmann, C. and Tipping, A., (2016), 'Fishing for the Future: An Overview of Challenges and Opportunities', 69 *Marine Policy* 173-180, at pp. 173-174.
[23] See Chapter 6, Section 1.
[24] Ibid; Supra n. 21, Scott.

integration through its Integrated Maritime Policy,[25] Marine Strategy Framework Directive,[26] annual 'Our Ocean' and 'European Maritime Day' conferences,[27] and focus on Blue Growth strategy.[28] Increasingly, many other international governmental and non-governmental organisations are also exploring the need for the new IOM paradigm, ranging from the International Union for the Conservation of Nature,[29] the UN Food and Agricultural Organization,[30] the US National Oceanic and Atmospheric Administration,[31] the World Wildlife Fund,[32] UNESCO,[33] and the Conference of the Parties under the 1992 Convention on Biological Diversity.[34] This and the following chapter will therefore explore the likely meaning of such an 'integrated' system, as well as further reasons *why* this new model of ocean governance is needed.

It was already demonstrated in Chapter 3 that reliance upon hortatory commitments to 'cooperate' in the protection of UCH is unlikely to lead to effective or meaningful obligations. Similarly, in examining the challenges of international cooperation further, Chapter 4 also showed that various characteristics of UCH protection made it a global public good and thus prone to poor international compliance and the national prioritisation of economic development over the advancement of social and ecological

[25] European Commission, (2007), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union*, COM (2007) 574.
[26] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), 164 *Official Journal of the European Union* 19-40.
[27] United Nations, (2017), 'Our Ocean Conference', UN Sustainable Development Knowledge Platform, 5 October 2017, (at: https://sustainabledevelopment.un.org/?page=view&nr=1381&type=230&menu=2059; accessed 2 January 2019); European Commission, (2017), 'European Maritime Day host cities 2020-2024 announced', *Maritime Affairs*, 26 June 2017 (Brussels), (at: https://ec.europa.eu/maritimeaffairs/content/european-maritime-day-host-cities-2020-2024-announced_en; accessed 2 January 2019).
[28] European Commission, (2012), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Blue Growth opportunities for marine and maritime sustainable growth*, COM (2012) 494.
[29] Belfiore, S., Cicin-Sain, B. and Ehler, C. N. (Eds.), (2004), *Incorporating Marine Protected Areas into Integrated Coastal and Ocean Management: Principles and Guidelines*, IUCN (Gland), (at: https://portals.iucn.org/library/sites/library/files/documents/PDF-2004-001.pdf; accessed 2 January 2019).
[30] Torrie, M., (2016), *Integrated Ocean Management - Fisheries, Oil, Gas, and Seabed Mining*, FAO Globefish Research Programme, Vol. 122, United Nations Food and Agricultural Organization (Rome), at: http://www.fao.org/3/a-i6048e.pdf; accessed 2 January 2019).
[31] NOAA, (2017), 'Global Leadership in Integrated Management of the Ocean', National Oceanic and Atmospheric Administration (Maryland), (at: https://oceanservice.noaa.gov/GLIMO/welcome.html; accessed 2 January 2019).
[32] WWF, 'Integrated Management: A Solution for a Crowded Sea', World Wildlife Fund (Gland), (at: http://wwf.panda.org/knowledge_hub/where_we_work/baltic/solution/integrated_ocean_management/; accessed 2 January 2019).
[33] UNESCO, (2019), 'One Planet, One Ocean', United Nations Educational, Scientific and Cultural Organization (Paris), (at: https://en.unesco.org/themes/one-planet-one-ocean; accessed 1 June 2019).
[34] Conference of the Parties for the Convention on Biological Diversity, 'Integrated Marine and Coastal Area Management (IMCAM)', CBD Secretariat (Montreal), (at: https://www.cbd.int/marine/imcam.shtml; accessed 2 January 2019).

interests of the global community. This chapter now takes these strands further to examine in further detail the weaknesses of the public international legal *system* in managing the transnational context of the ocean environment. In particular, it argues that much of the failure of the legal system to effectively steward the oceans is closely interlinked with three characteristic traits of Westphalian sovereignty: sovereign *absolutism*, *equality*, and *territoriality*. The chapter therefore leads to the argument, in Chapters 6 to 9, that a more 'integrated' model necessitates a greater regulatory role for the international community and the complementation of public international law with more transnational systems of law and governance. This includes a new role for nation states within the global framework, as explored in Chapter 8 and in the concluding Chapter 10.

Much of the literature that follows is focused on the international law governing the ocean's natural environment as a whole spatial domain, as opposed to solely on UCH protection. There are many reasons for this. Principally, the protection of the ocean's *natural* environment might as well be synonymous with the protection of the *cultural* environment.[35] Indeed, UCH is also regularly referred to as the "historic environment" and is often treated as integrated with the whole landscape.[36] Both the natural and cultural marine environment also suffer from identical pathologies to those unveiled in Chapter 4, such as the leaking of non-excludable and non-rivalrous value to transnational and intergenerational communities. As such, the growing body of research over the past few decades into failing marine environmental governance is well suited to now finally being transferred to an analysis in the context of UCH. A transnational and integrated approach also naturally invites multivocality and interdiscplinarity, requiring the inclusion of *all* competing and concurring values in the governed space.[37] Moreover, the lack of reference to UCH in much of this chapter arises from the simple fact that research in this

[35] Navrud, S. and Ready, R.C., (2002), 'Why Value Cultural Heritage?', in *Valuing Cultural Heritage: Applying Environmental Valuation Techniques to Historic Buildings, Monuments and Artifacts*, S. Navrud and R.C. Ready (Eds.), 3-9, Edward Elgar (Cheltenham), at p. 3; Francioni, F., (2008), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press (Oxford), at p. 5.

[36] Firth, A., (2014), *UK Safeguarding of Underwater Cultural Heritage: Factual Background*, Unpublished Briefing Paper for BA/HFF Steering Committee on UCH, Fjordr (Tisbury), Ref: 16200, (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2014/03/Safeguarding-Underwater-Cultural-Heritage-in-the-UK-Factual-Background-200314.pdf; accessed 2 January 2019), at p. 4.

[37] Blæsbjerg, M., Pawlak, J.F., Sørensen, T.K. and Vestergaard, O., (2009), *Marine Spatial Planning in the Nordic Region - Principles, Perspectives and Opportunities*, Nordic Council of Ministers (Copenhagen), (at: https://www.imr.no/filarkiv/2011/03/msp_nordic_region.pdf/en; accessed 2 January 2019), at p. 23; Gilliland, P.M. and Laffoley, D., (2008), 'Key Elements and Steps in the Process of Developing Ecosystem-Based Marine Spatial Planning', 32 *Marine Policy* 787-796, at p. 795.

field has not yet linked IOM, as is being increasingly called for in the protection of the natural environment, to UCH protection.

Section 2 will introduce the concept of transnational law as it stands in contrast to the Westphalian system of public international law, highlighting the worldwide movement to recognise and encourage law beyond the state, as well as the blurring of 'public' and 'private' sources and systems of law. Section 3 then critically examines the public international law system which has governed ocean management up to now, showing the various ways in which Westphalianism can be linked to many of the failures of ocean stewardship by humankind. Section 4 continues by arguing that the UNESCO Convention suffers from the exact same pathologies and weaknesses, including ambiguity, limited inclusivity, fragmentation, and non-compliance. This then sets the pathway to Chapters 6 to 9, which provide a potential solution for improving ocean governance – in the form of transnational governance effected through a multi-level frame – which could more effectively address the protection of UCH by bolstering the inter-national system with supra-national and non-national systems.

2. Introducing Transnational Law

'Westphalian sovereignty' refers to our familiar system of inter-national law resolved during thirty years of negotiations over the Münster and Osnabrück treaties, concluded between numerous European nations in 1648, and effectively ending the European wars of religion – a point in history known as the 'Peace of Westphalia'.[38] Most recognise that 'Westphalianism' was not necessarily *created* at this moment, having been organically developed over many centuries around the world, but that this is a convenient moment in time to identify its express invocation between European states.[39] The effect, ultimately, was the formal legitimation of the nation state as exclusive legal authority for all matters territorially internal and to see nation states as all entirely equal and unitary for all external matters.[40] A corollary to achieving temporary peace across Europe within this emergent multi-state system was the necessary demotion of the conceptual authority of the church and other power-aspiring non-state actors, including internal lords, provinces and

[38] Croxton, D., (1999), 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', 21(3) *The International History Review* 569-591; Philpott, D., (2001), *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton University Press (Princeton), at pp. 73-150.
[39] Ibid, Croxton, at p. 570; Ruggie, J.G., (1983), 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis', 35(2) *World Politics* 261-285, at pp. 275-276.
[40] Hinsley, F., (2009), *Sovereignty*, 2nd Edn, Cambridge University Press (Cambridge); Grimm, D., (2015), *Sovereignty: The Origin and Future of a Political Concept*, Columbia University Press (New York).

religious factions.[41] International governance between the 17th Century and 20th Century thus centred upon the construction of zonal political boundaries and the demarcation of sovereignty within territories, in which monolithic states possessed absolute independence to determine their own internal laws free from outside influence and interference.[42] The construction of rigid political borders around states and depiction of states as entirely unitary and equal has, over the centuries, thus given birth to our modern system of "inter-national" law today, founded upon the principle of sovereign territorial independence and the conclusion of positive international treaties and resolving of customary norms between nations.[43] Today, we remain firmly within this Westphalian system of international law and thinking.[44]

National sovereignty has therefore been at the heart of our understanding of law and jurisprudence for several centuries, with most legal philosophers in this time having explicated law's basis as being positively determined by a higher authority, whether through the canon of natural law, or as achieved functionally through the formal use of power.[45] Even as recently as the 1960s, both Hart's famous primary and secondary rules and Kelsen's *Grundnorm* theories espoused that law's ultimate source of power is derived

[41] Supra n. 38, Croxton; Supra n. 38, Philpott, at pp. 73-150.
[42] Kissinger, H., (2014), *World Order: Reflections on the Character of Nations and the Course of History*, Penguin (London), at pp. 11-48; Djelic, M-L. and Sahlin, K., (2012), 'Reordering the World: Transnational Regulatory Governance and its Challenges', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 745-758, Oxford University Press (Oxford), at p. 746.
[43] Johnson, J.T., (2014), *Sovereignty: Moral and Historical Perspectives*, Georgetown University Press (Washington DC), at p. 91; Supra n. 38, Croxton; Ibid, Kissinger; Cutler, A.C., (2001), 'Critical Reflections on the Westphalian Assumptions of International Law and Organizations: A Crisis of Legitimacy'. 27(2) *Review of International Studies* 133-150; Gross, L., (1948), 'The Peace of Westphalia, 1648-1948', 42(1) *American Journal of International Law* 20-41, at pp. 40-41; c.f., Osiander, A., (2001), 'Sovereignty, International Relations, and the Westphalian Myth', 55(2) *International Organization* 251-287; Teschke, B., (2009), *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*, 2nd Edn, Verso Publishers (New York).
[44] Weiss, T.G. and Daws, S. (2008), 'The United Nations: Continuity and Change', in *The Oxford Handbook on the United Nations*, T.G Weiss and S. Daws (Eds.), 30-40, Oxford University Press (Oxford), at p. 4; Jackson, J.H., (2010), 'Sovereignty - Modern: A New Approach to an Outdated Concept', 97(4) *American Journal of International Law* 782-802; Camilleri, J. and Falk, J., (1992), *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World*, Edward Elgar (Cheltenham); Halliday, T.C. and Shaffer, G.C., (2014), 'Transnational Legal Orders', in *Transnational Legal Orders*, T.C. Halliday and G. Shaffer (Eds.), 3-74, Cambridge University Press (Cambridge), at pp. 6 and 13; Fowler, M.R. and Bunck, J.M., (1995), *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, Pennsylvania State University Press (University Park).
[45] Expressed, for example, by Thomas Hobbes, John Locke, Jeremy Bentham, John Austin, and Immanuel Kant. See: Hobbes, T., (1651), *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*, 2010 Reissue, I. Shapiro (Ed.), Yale University Press (New Haven); Penner, J. and Melissaris, E., (2012), *McCoubrey & White's Textbook on Jurisprudence*, 5th Edn, Oxford University Press (Oxford), at pp. 40-47; Locke, J., (1689), *Two Treatises of Government*, 2008 Reissue, Peter Laslett (Ed.), Cambridge University Press (Cambridge); Austin, J., (1832), *The Province of Jurisdiction Determined*, John Murray (London); Kant, I., (1797), *The Metaphysics of Morals*, 1996 Reissue, M. Gregory (Ed.), Cambridge University Press (Cambridge), at p. 25.

by its production through foundational law-making infrastructure, invariably found in the nation state.[46] Such positivist accounts of law remain or have become, unconsciously at least, widely subscribed among people today: most of us do not believe that any law is 'law' unless it is posited by a national government through judicial or legislative architecture.[47] However, the multiple and ever-intensifying processes of globalisation over the past half century have triggered a revisit of the positivist and nationalist account. In an increasingly transnational world, there has been a global movement towards a more legally pluralist and sociological view, taking a broader view of law's underlying quality as a norm. Whether the identification of non-state law is achieved by Tamanaha's Labelling System,[48] Bogdandy's Systems Theory,[49] Teubner's Autopoietic Theory,[50] Twining's Levels Theory,[51] or Calliess's Running Code Theory,[52] just as examples, the direction of recent thinking has been predominantly consonant: not all law does, nor should, originate from the nation state. It can be written or unwritten, its sources can be local, communal, religious, supranational, or global, as well as being public, private or hybrid, and it can possess normativity on a spectrum between the extremities of hard and soft.[53] In the globalisation context, such accounts of 'Global Legal Pluralism' open up the possibility that all of us can be subject to multiple legal obligations, many of which can originate within or without the domestic legal system of our state of residence.[54]

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[46] Hart, H.L.A., (1961), *The Concept of Law*, Clarendon Law Series (Oxford); Kelsen, H., (1960), *Pure Theory of Law*, 2nd Edn, 2009 Reissue, M. Knight (Translator), The Lawbook Exchange (New York). 'A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.' (Rawls, J., (1971), *A Theory of Justice*, Harvard University Press (Cambridge, MA), at p. 235).

[47] Dalhuisen, J.H., (2006), 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria', 24(1) *Berkeley Journal of International Law* 129-191, at p. 132; Goldring, J., (1998), 'Globalisation, National Sovereignty and the Harmonisation of Laws', 3(2-3) *Uniform Law Review* 435-452, at p. 440; Schultz, T., (2009), 'Some Critical Comments on the Juridicity of Lex Mercatoria', 10 *Yearbook of Private International Law* 667-711.

[48] Tamanaha, B.Z., (2000), 'A Non-Essentialist Version of Legal Pluralism', 27(2) *Journal of Law and Society* 296-321.

[49] E.g., von Bogdandy A. and Dellavalle, S., (2013), 'The *Lex Mercatoria* of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective', 4(1) *Transnational Legal Theory* 59-82.

[50] Teubner, G., (1997), *Global Law Without a State*, Dartmouth Publishing (London).

[51] Twining, W., (2009), *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge University Press (Cambridge), at pp. 362-375.

[52] Calliess, G-P., (2003), 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law', 23(2) *Zeitschrift für Rechtssoziologie* 185-216.

[53] Merry, S.E., (1988), 'Legal Pluralism', 22(5) *Law & Society Review* 869-896; von Benda-Beckman, F., (2002), 'Who is Afraid of Legal Pluralism?', 34(47) *Journal of Legal Pluralism and Unofficial Law* 37-82; Tamanaha, B.Z., Sage, C. and Woolcock, M. (Eds.), (2012), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge University Press (Cambridge).

[54] Helfand, M.A., (2015), 'Introduction', in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, M.A. Helfand (Ed.), 1-14, Cambridge University Press (Cambridge), at p. 2; Etty, T., Heyvaert, V., Carlarne, C., Farber, D., Lin, J. and Scott, J., (2014), 'Pursuing Transnational Policy Change', 3(2) *Transnational Environmental Law* 229-239, at p. 235; Krisch, N., (2010), *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press (Oxford), at pp. 69-108.

Naturally, there remain traditionalists who dispute this perspective and, in some ways, the battle lines are presently drawn between the legal positivists, who maintain an account of law built upon 'national' sovereignty, and legal pluralists, who recognise and, in many cases actively seek to expand, additional laws 'beyond the state'.[55]

Certainly, the pluralist account has been very warmly welcomed in the globalised era.[56] Over the past half-century, this account has thus led to the contemporaneous development of an entirely new legal discourse in 'Transnational Law'.[57] Transnational law, as widely understood, seeks to comprehend and even encourage the complex configuration of legal rules and norms, both within and without the state.[58] Its appeal lies in its comprehension of the pluralist account of a globalised world which recognises that numerous actors beyond the nation state can be a source of legal norms or the principal actors in a legal system.[59] Whether its supranational regulation, global standards derived by non-state bodies, industry self-regulation, private dispute settlement, or community norms, transnationalists recognise that individuals are often subject to rules through a variety of compliance-inducing forces, whether positive, moral, communal, virtual, physical,

[55] Michaels, R. and Jansen, N., (2006), 'Private Law Beyond The State? Europeanization, Globalization, Privatization', 54(4) *American Journal of Comparative Law* 843-890, at p. 870; Caruso, D., (2006), 'Private Law and State-Making in the Age of Globalisation', (2006), 39(1) *New York University Journal of International Law and Policy* 1-74, at p. 70; Zumbansen, P., (2002), 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', 8(3) *European Law Journal* 400-432, at p. 428; Cutler, A.C., (2003), *Private Power and Global Authority: Transnational Merchant Law In The Global Economy*, Cambridge University Press (Cambridge), at p. 60; Supra n. 50, Teubner, at p. 9; c.f., Agnew, J., (2017), *Globalization and Sovereignty: Beyond the Territorial Trap*, 2nd Edn, Rowman & Littlefield Publishers (Lanham).

[56] Zumbansen, P., (2013), 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power', 76(2) *Law and Contemporary Problems* 117-138; Michaels, R., (2007), 'The True *Lex Mercatoria*: Law Beyond the State', 14(2) *Indiana Journal of Global Legal Studies* 447-469; Supra n. 51, Twining, at pp. 362-375; de Sousa Santos, B., (1995), *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, Routledge (Abingdon).

[57] Berman, P.S., (2015), 'Non-State Lawmaking through the Lens of Global Legal Pluralism' in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, M.A. Helfand (Ed.), 15-40, Cambridge University Press (Cambridge), at p.15; Maduro, M., Tuori, K. and Sankari, S. (Eds.), (2014), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press (Cambridge); Supra n. 44, Halliday and Shaffer.

[58] Ibid; Helfand, M.A. (Ed.), (2015), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, Cambridge University Press (Cambridge).

[59] Berman, P.S., (2016), 'The Evolution of Global Legal Pluralism', in *Authority in Transnational Legal Theory: Theorising across Disciplines*, R. Cotterrell and M. Del Mar (Eds.), 151-190, Edward Elgar (Cheltenham); von Daniels, D., (2010), *The Concept of Law from a Transnational Perspective*, Routledge (Abingdon); Cotterrell, R., (2012), 'What is Transnational Law?', 37(2) *Law and Social Enquiry* 500-524; Tuori, K., (2014), 'Transnational Law: On Legal Hybrids and Legal Perspectivism', in *Transnational Law: Rethinking European Law and Legal Thinking*, M. Maduro, K. Tuori and S. Sankari, 11-58, Cambridge University Press (Cambridge), at pp. 23-26; Micklitz, H-W., (2014), 'Rethinking the Public/Private Divide', in *Transnational Law: Rethinking European Law and Legal Thinking*, M. Maduro, K. Tuori and S. Sankari, 271-306, Cambridge University Press (Cambridge), at 273; Zumbansen, P., (2012), 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism', 21(2) *Transnational Law and Contemporary Problems* 305-336, at p. 308; Avbelj, M., (2018), *The European Union under Transnational Law: A Pluralist Appraisal*, Hart (Oxford).

internal, or natural.[60] Nevertheless, it is crucial to recognise that international law still remains loyally state-centric: the vast majority of legal objects subscribe fully to the legal rules of a selected domestic legal system, whether by territorial situation, contractual choice or by imposition through private international law, and most actors rationalise themselves as so subject.[61] As such, transnational law is more the witnessing of an emerging diversification and fragmentation in sources and subjects of law, rather than a persuasive account of the lex lata.[62]

Transnational law's appeal lies particularly in the romantic notion of finding overlapping international 'communities' or networks who subject themselves to a self-crafted legal system built around internal legal rules (self-defined or based on community custom) and external legal rules (state, supranational and global laws), replete with their own dedicated machinery for internal norm resolution or enforcement (including by negotiation, arbitration or adjudication).[63] The most famous such global system is the supposed medieval *lex mercatoria* ('merchant law'), which has arguably been recently revived into a 'modern law merchant', constituting an international system of commercial customs and usages, whether state or non-state in origin, to which transnational commercial actors subject themselves today.[64] This is largely supported by the almost unquestioning recognition of legality of arbitration awards and the very high level of internal compliance with them,[65] as well as new methods of internal coercion across the business community,[66] with strong reputational, mutual obligation and internalisation mechanisms occasioning compliance[67] and, in many instances, a recognition that the sovereign state

[60] Berman, P.S., (2009), 'The New Legal Pluralism', 5 *Annual Review of Law and Social Science* 225-242; Berman, P.S., (2007), 'Global Legal Pluralism', 80(6) *Southern California Law Review* 1155-1238, at pp. 1157-1158; Berman, P.S., (2007), A Pluralist Approach to International Law', 32(2) *Yale Journal of International Law* 301-330.
[61] Supra n. 47.
[62] E.g., Heyvaert, V., (2017), 'The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation', 6(2) *Transnational Environmental Law* 205-236; Sassen, S., (1996), *Losing Control?: Sovereignty in an Age of Globalization*, Columbia University Press (New York); Djelic, M-L. and Sahlin, K., (2012), 'Reordering the World: Transnational Regulatory Governance and its Challenges', in *Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 745-758, Oxford University Press (Oxford); Koh, H.H., (2006), 'Why Transnational Law Matters', 24(4) *Penn State International Law Review* 745-754.
[63] See generally, supra n. 44, Halliday and Shaffer.
[64] E.g., Stone Sweet, A., (2006), 'The New Lex Mercatoria and Transnational Governance', 13(5) *Journal of European Public Policy* 627-646; Berger, K.P., (2000), 'The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law', 3(4) *International Arbitration Law Review* 91-102; Trakman, L.E., (1980), 'The Evolution of the Law Merchant: Our Commercial Heritage', 12(1) *Journal of Maritime Law and Commerce* 1-24; c.f., Drahozal, C.R., 'Contracting out of National Law: An Empirical Look at the New Law Merchant', 80(2) *Notre Dame Law Review* 523-552; Cuniberti, G., (2014), 'Three Theories of Lex Mercatoria', 52(2) *Columbia Journal of Transnational Law* 369–434.
[65] Supra n. 56, Michaels, at p. 455.
[66] E.g., Hadfield, K., (2001), 'Privatizing Commercial Law', 24(1) *Regulation* 40-45, at p. 40.
[67] Supra n. 47, Dalhuisen, at p. 174; Michaels, R., (2005), 'The Re-Statement of Non-State Law: The State,

has 'acquiesced' its role in deciding transnational commercial matters[68] and readily recognises and enforces applications of non-state law.[69] This picture of a transnational legal system, most romantically found in the commercial context, has also found expression in numerous other idealistic visions of global legal communities, such as the *lex sportiva* ('sports law'),[70] *lex informatica* ('information law' or cyber law),[71] *lex constructionis* ('construction law'),[72] *lex financiaria* or *argentaria* ('finance law'),[73] *lex petrolea* ('oil law'),[74] and, interestingly for the present purposes, the *lex maritima* ('maritime law').[75]

The lex maritima envisages that, long before nation states appropriated the law of the sea and transcribed it into domestic legislation, much maritime activity was self-governed by the maritime community themselves.[76] It has been argued that the networking of mariners across continental ports in previous centuries necessitated the development of their own systems of rules and customs, which were often enforced internally or via available town councils, merchant courts and guild consuls.[77] Indeed, it seems well accepted that prior to the imbedding of the Westphalian ideology from the 17th Century, much of the maritime community's rules had been built out of widely shared codes and customary

Choice of Law, and the Challenge from Global Legal Pluralism', 51(3) *Wayne Law Review* 1209-1260, at p. 1237.

[68] Supra n. 64, Stone Sweet, at p. 638; Supra n. 55, Michaels and Jansen, at p. 872; Carbonneau, T.E., (1997), *Cases and Materials on Commercial Arbitration*, Adams and Reese Legal Series, Volume 1, Juris Publishing (Hartington), at p. 293.

[69] Baron, G., (1999), 'Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?', 15(2) *Arbitration International* 115-130, at p. 126; Rivkin, D., (1993), 'Enforceability of Arbitral Awards Based on *Lex Mercatoria*', 9(1) *Arbitration International* 67-84; Shapiro, M. and Stone Sweet, A., (2002), *On Law, Politics, and Judicialization*, Oxford University Press (Oxford), at p. 312.

[70] Siekmann, R.C.R. and Soek, J. (Eds.), (2012), *Lex Sportiva: What is Sports Law?*, TMC Asser Press (The Hague); Duval, A., (2013), 'Lex Sportiva: A Playground for Transnational Law', 19(6) *European Law Journal* 822-842.

[71] Mefford, A., (1997), 'Lex Informatica: Foundations of Law on the Internet', 5(1) *Indiana Journal of Global Legal Studies* 211-237 (1997); Reidenberg, J., (1998), 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', 76(3) *Texas Law Review* 553-594.

[72] Molineau, C., (1997), 'Moving Toward a Lex Mercatoria – A Lex Constructionis', 14(1) *Journal of International Arbitration* 55-66.

[73] Riles, A., (2011), *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*, University of Chicago Press (Chicago).

[74] Martin, T., (2014), '*Lex Petrolea* in International Law', in *Dispute Resolution in the Energy Sector: A Practitioner's Handbook*, R. King (Ed.), 95-108, Globe Law and Business (London); c.f., Daintith, T., (2017), 'Against *Lex Petrolea*', 10(1) *Journal of World Energy Law & Business* 1-13.

[75] Tetley, W., (2004), 'The General Maritime Law – The Lex Maritima', 20 *Syracuse Journal of International Law and Commerce* 105-146; Maurer, A., (2012), *Lex Maritima: Grundzuge eines transnationalen Seehandelsrechts*, Mohr Siebeck (Tübingen).

[76] Cordes, A., (2016), 'Lex Maritima? Local, Regional, and Universal Maritime Law in the Middle Ages', in *The Routledge Handbook of Maritime Trade around Europe 1300–1600*, W. Blockmans, M. Krom and J. Wubs-Mrozewicz (Eds.), 69-85, Routledge (Abingdon).

[77] Senior, W., (1952), 'The History of Maritime Law', 38(4) *The Mariner's Mirror* 260-275; Supra n. 64, Trakman; Supra n, 75, Tetley.

principles, such as the Lex Rhodia, Rôles d'Oléron, Laws of Wisby, and the Consolata del Mare.[78] For example, one historian noted how maritime law was regarded as a universal and 'common system of law', given that '[t]here was . . . in those days nothing strange in laws that were not national'.[79] Therefore, the extent to which these maritime codes actually formed a unified common law, in preference to local custom and decentred regulation, has for some time been a question of academic interest.

However, more recent and detailed scholarship on the matter has put considerable doubt on whether such a *common* maritime law ever existed.[80] Indeed, many have correctly pointed out that the dearth of social bonds and interdependencies between regional actors in the pre-globalisation age makes it inevitable that any efforts at unified laws across continents would have been undermined by divergent customs and interests.[81] A great deal of academic commentary has therefore attempted to disprove the transnational account by disproving the historical account;[82] when, in reality, the question is whether common codes or systems of community self-government between maritime stakeholders could be a positive addition to a patchwork of discrete national laws today, not whether it was commonplace in the pre-Westphalian era. In other words, whether or not a common maritime law existed in the medieval period does not detract from this chapter's central hypothesis that unified systems can carry normative advantages. As Michaels has said, 'whether there ever was a true lex mercatoria [is] relatively secondary.'[83]

Along this more precise line of enquiry, the commentary is far more unanimous. For example, a system of maritime community-led law should carry additional advantages of efficiency through utilisation of stakeholder resources, lower transaction costs, and strong compliance incentivisation.[84] By penalisation, suspension or ostracism of community

[78] Hughes, R.M. (1920), *Handbook of Admiralty Law*, West Publishing Company (Eagan), at pp. 5-6; Frankot, E., (2007), 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea', in *Communities in European History: Representations, Jurisdictions, Conflicts*, Pan-Montojo, J. and Pedersen, F. (Eds.),151-172, Pisa University Press (Pisa).
[79] Supra n. 77, Senior, at pp. 260-261.
[80] Frankot, E., (2012), *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, Edinburgh University Press (Edinburgh); Supra n. 76, Cordes; Kadens, E., (2012), 'The Myth of the Customary Law Merchant', 90(5) *Texas Law Review* 1153-1206; Sachs, S.E., (2006), 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant', 21(5) *American University International Law Review* 685-812.
[81] E.g., Supra n. 64, Trakman, at pp. 20-21; Kadens, E., (2004), 'Order within Law, Variety within Custom: The Character of the Medieval Merchant Law', 5(1) *Chicago Journal of International Law* 39-66.
[82] E.g., Supra n. 80, Kadens; Mustill, M.J., (1988), 'The New Lex Mercatoria: The First Twenty-five Years', 4(2) *Arbitration International* 86-119.
[83] Supra n. 56, Michaels, at p. 449.
[84] Benson, B.L., (1989), 'The Spontaneous Evolution of Commercial Law', 55(3) *Southern Economic Journal* 644-661, at pp. 646-651; Trakman, L.E., (2003), 'From the Medieval Law Merchant to E-Merchant

members, it would also be possible to effectively punish rule-breakers and to improve trade access by reputational mechanisms, trust-building and clearing houses.[85] Furthermore, there is an argument that such communities of mariners would hold greater esteem towards legal rules which were crafted and enforced by and amongst themselves.[86] In other words, by eschewing the strict role of the nation state, a 'transnational' legal system has a greater capacity to handle the complex, reflexive and multi-level interactions in the globalised or transnational context. There is much more that could be said on the concept, meaning, existence and true efficacy of a historic and medieval lex maritima, along with theories of a universal ius gentium.[87] However, such a historiographical foray is, for the reasons noted, unfortunately beyond the objectives of this study.

Given that transnational law and governance has expanded into a vast field of international academic study, a detailed engagement in its various definitions, debates and themes is also unfortunately beyond the focus of this chapter.[88] Nevertheless, it is worth noting the early definition provided by Philip Jessup in his clairvoyant introduction to the subject in 1956, which still commands an impressive level of subscription among thinkers today.[89] Here the incipient subject of transnational law was defined as '*all* law which regulates actions or events that transcend national frontiers. Both public and

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Law', 53(3) *University of Toronto Law Journal* 265-304; De Ly, F., (2001), 'Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation', in *Rules and Networks: The Legal Culture of Global Business Transactions*, R. Appelbaum, W.L.F. Felstiner and V. Gessner (Eds.), 159-188, Hart (Oxford); Basedow, J., (2007), 'Lex Mercatoria and the Private International Law of Contracts in Economic Perspective', 12(4) *Uniform Law Review* 697-714; Greif, A., (2006), *Institutions and the Path to the Modern Economy: Lessons from the Medieval Trade*, Cambridge University Press (Cambridge); Cooter, R.D., (1996), 'Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant', 144(5) *University of Pennsylvania Law Review* 1643-1696.

[85] E.g., Milgrom, P.R., North, D.C. and Weingast, B.R., (1990), 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', 2(1) *Economics & Politics* 1-23; Greif, A., Milgrom, P.R. and Weingast, B.R., (1994), 'Coordination, Commitment and Enforcement: The Case of the Merchant Guild', 102(4) *Journal of Political Economy* 745-776; Benson, B.L., (2010), 'It Takes Two Invisible Hands to Make a Market: Lex Mercatoria (Law Merchant) Always Emerges to Facilitate Emerging Market Activity', 3 *Studies in Emergent Order* 100-128; Myerson, R.B., (2004), 'Justice, Institutions, and Multiple Equilibria', 5(1) *Chicago Journal of International Law* 91-108; Wubs-Mrozewicz, J., (2012), 'Introduction', in *The Hanse in Medieval and Early Modern Europe*, J. Wubs-Mrozewicz and S. Jenks (Eds.), 1-25, Brill (Leiden); Masten, S.E. and Prüfer, J., (2014), 'On the Evolution of Collective Enforcement Institutions: Communities and Courts', 43(2) *Journal of Legal Studies* 359-400.

[86] See Chapter 9, Section 2.

[87] E.g., Sherman, G.E., (1918), 'Jus Gentium and International Law', 12(1) *American Journal of International Law* 56-63.

[88] Slaughter, A-M., (2000), 'A Liberal Theory of International Law', 94 *Proceedings of the American Society of International Law Annual Meeting*, 240-249, at p. 245; Menkel-Meadow, C., (2011), 'Why and How to Study Transnational Law', 1(1) *UC Irvine Law Review* 97-129, at pp. 103-105; Cotterrell, R., (2012), 'What Is Transnational Law?', 37(2) *Law & Social Inquiry* 500-524, at p. 501; Zumbansen, P., (2010), 'Transnational Legal Pluralism', 1(2) *Transnational Legal Theory* 141-189.

[89] Kalderimis, D., (2010), 'Is Transnational Law Eclipsing International Law?', in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, P.H.F. Bekker, R. Dolzer and M. Waibel (Eds.), 93-107, Cambridge University Press (Cambridge), at p. 98.

private international law are included, as well as other rules which do not wholly fit into such standard categories.'[90] This definition thus exemplifies the potential vastness of the field. More precisely, however, this study will adopt perhaps the most common understanding of transnational law, seeing it as a global legal system which recognises and promotes all legal norms, of public, private and hybrid origin, and varying between hard and soft, which apply to the multiplicity of actors interacting across and between multiple governance levels (local, national, regional and global). In other words, transnational governance emphasises the multi-faceted, multiple-level and multiple-stakeholder nature of global challenges and seeks to look beyond a merely Westphalian, or "inter-national", perspective of global regulation and order.

The traditional account of international law has hence created an unfortunately limited dualistic account of law; between public international law which covers agreements *between* states; and municipal law, covering national law *within* states.[91] To compound this duality, lawyers and scholars tend to be neatly divided into those who specialise in one enclosed field or the other.[92] This has arguably resulted in the neglect of a growing number of legal norms outside multilateral treaties and national law which carry normativity without sole reliance on state power, such as: industry self-regulation and standards; supranational law; standards and rules developed by international governmental, non-governmental or epistemic bodies; cooperation in law development and enforcement between public and private partners; and other local, religious, or global standards; and all forms of 'governance', hard or soft. Through internal enforcement mechanisms, such as peer pressure, media scrutiny, economic sanctions, loss of trade access, diminution in consumer demand, and loss of network access, it may also be possible to drive high levels of direct compliance by stakeholders with transnational rules such as through industry standards, certification schemes, internal adjudicative processes, community agreed rules, or other non-state derived laws. Nation states can also loan their domestic enforcement architecture to external private, regional or global legal systems, in order to bolster the external network's internal power of enforcement.[93]

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[90] Jessup, P., (1956), *Transnational Law*, Yale University Press (New Haven), at p. 2 (emphasis added).
[91] Supra n. 44, Halliday and Shaffer, at p. 3; Crawford, J.R., (2012), *Brownlie's Principles of Public International Law*, 8th Edn, Oxford University Press (Oxford), at pp. 48-61.
[92] Steiner, H.J., (2010), 'Constructing and Developing Transnational Law: The Contribution of Detley Vagts', in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, P.H.F. Bekker, R. Dolzer and M. Waibel (Eds.), 10-16, Cambridge University Press (Cambridge), at p.11.
[93] E.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958 (New York), in force 7 June 1959), 330 UNTS 38. Nollkaemper, A., (2002), 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order', 13 *Yearbook of International Environmental Law* 165-186, at pp. 173-175.

Transnational law thus grapples with the: transition from global 'government' to 'governance';[94] ongoing fragmentation of international law;[95] intensifying processes of globalisation;[96] increased role of non-state actors in the administration of global public governance;[97] blurring between private and public stakeholders, and public and private law, in the transboundary context;[98] growing conceptual uncoupling of states from monolithic units into complex administrative agents;[99] growing role of transboundary

[94] Rosenau, J., (2000), 'Change, Complexity and Governance in a Globalizing Space', in *Debating Governance: Authority, Steering, and Democracy*, J. Pierre (Ed.), 167–200, Oxford University Press (Oxford), at p. 167; Bonnafous-Boucher, M., (2005), 'From Government to Governance', in *Stakeholder Theory: A European Perspective*, M. Bonnafous-Boucher and Y. Pesqueux (Eds.), 1-23, Palgrave Macmillan (London).

[95] International Law Commission, (2006), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, M. Koskenniemi (Ed.), United Nations General Assembly, (at: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf; accessed 2 January 2019); Klabbers, J., (2013), 'Of Round Pegs and Square Holes: International Law and the Private Sector', in *Regulatory Hybridization in the Transnational Sphere*, P. Jurcys, P.F. Kjaer and R. Yatsunami (Eds.), 29-48, Brill (Leiden); Hafner, G., (2003), 'Pros and Cons Ensuing from Fragmentation of International Law', 25(4) *Michigan Journal of International Law* 849-863.

[96] Auby, J-B., (2017), *Globalisation, Law and the State*, Hart (Oxford); Supra n. 44, Halliday and Shaffer, at p. 4; Ip, E.C., (2010), 'Globalization and the Future of the Law of the Sovereign State', 8(3) *International Journal of Constitutional Law* 636-655; Garcia, F.J., (2017), 'Globalization's Law: Transnational, Global or Both?', in *The Global Community Yearbook of International Law and Jurisprudence 2015*, G.Z. Capaldo (Ed.), 31-46, Oxford University Press (Oxford).

[97] Howley, J., (2009), 'The Non-State Actor and International Law: A Challenge to State Primacy?', 7(1) *Dialogue* 1-19; Peters, A. (Editor), Koechlin, L., Förster T. and Zinkernagel, G.F. (Eds.), (2009), *Non-State Actors as Standard Setters*, Cambridge University Press (Cambridge); Charnovitz, S., (2005), 'The Relevance of Non-State Actors to International Law', in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben (Eds.), 543-556, Springer (New York); Clapham, A., (2006), *Human Rights Obligations of Non-State Actors*, Oxford University Press (Oxford); Alston, P. (Ed.), (2005), *Non-State Actors and Human Rights*, Oxford University Press (Oxford); Slaughter, A-M., (1997), 'The Real New World Order', 76(5) *Foreign Affairs* 183-197; Sands, P., (2001), 'Turtles and Torturers: The Transformation of International Law', 33(2) *New York University of International Law* 527-560; Spiro, P.J., (1997), 'New Players on the International Stage', 2 *Hofstra Law and Policy Symposium* 19-36; Hofmann, R. (Ed.), (1998), *Non-State Actors as New Subjects of International Law*, Duncker and Humblot (Berlin).

[98] Supra n. 59, Micklitz; Heyvaert, V. and Etty, T., (2012), 'Introducing Transnational Environmental Law', 1(1) *Transnational Environmental Law* 1-11, at p.4; Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at pp. 151-152. Peters, A., (2010), 'Transnational Law Comprises Constitutional, Administrative, Criminal and Quasi-Private Law', in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, P.H.F. Bekker, R. Dolzer and M. Waibel (Eds.), 154-173, Cambridge University Press (Cambridge), at p. 170; Casini, L., (2014), '"Down the Rabbit-Hole": The Projection of the Public/Private Distinction Beyond the State', 12(2) *International Journal of Constitutional Law* 402-428; Reimann, M., (2004), 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum', 22(3) *Penn State International Law Review* 397-415, at pp. 402-408.

[99] Osofsky, H.M., (2012), 'The Creation of the International Law of Climate Change: Complexities of Sub-State Actors', in *Non-State Actors, Soft Law and Protective Regimes: From the Margins*, C.M. Bailliet (Ed.), 179-199, Cambridge University Press (Cambridge), at p. 190; Supra n. 57, Berman, at p. 20; Schreuer, C., (1993), 'The Warning of the Sovereign State: Towards a New Paradigm for International Law', 4(4) *European Journal of International Law* 447-471, at p. 450; Frug, G.E. and Barron, D.J., (2006), 'International Local Government Law', 38(1) *The Urban Lawyer* 1-62.

normative and policy networks;[100] postcolonial recognition of incongruity between indigenous or traditional laws with centralised state authority;[101] growing use of negotiation, mediation, arbitration, expert opinion and other private mechanisms of dispute resolution in transnational settings; increasing demands and uses for regulatory harmonisation;[102] growing interconnectedness of global society enabling decisions in one state to impact on other states' internal interests;[103] and the generally observed recession in the role of the nation state, as traditionally understood, in resolving cross-border challenges.[104]

While accounts differ on whether transnational law is a merely positive subject (determining what is) or a normative subject (determining what should be), it in fact must be right to accept its inherently normative objects.[105] Indeed, its popularity as a field of study is largely driven by displeasure with the slow, expensive, complex, inconsistent and unpredictable system of international law which exists under public and private international law (see infra Section 3). Furthermore, as was explored in Chapter 4 and is argued below, any legal system built purely around Westphalianism and the equality of

[100] Betsill, M.M. and Bulkeley, H., (2004), 'Transnational Networks and Global Environmental Governance: The Cities for Climate Protection Program', 48(2) *International Studies Quarterly* 471-493; Hamann, A. and Ruiz Fabri, H., (2008), 'Transnational Networks and Constitutionalism', 6(3-4) *International Journal of Constitutional Law* 481-508; Stone, D., (2008), 'Global Public Policy, Transnational Policy Communities, and Their Networks', 36(1) *Policy Studies Journal* 19-38; Senn, M., (2011), *Non-State Regulatory Regimes: Understanding Institutional Transformation*, Springer (New York); Supra n. 98, Bederman, at pp. 83-85.

[101] Hobson, J.M., (2013), 'The Other Side of the Westphalian Frontier', in *Postcolonial Theory and International Relations: A Critical Introduction*, S. Seth (Ed.), 32-48, Routledge (Abingdon); Pitty, R. and Smith, S., (2011), 'The Indigenous Challenge to Westphalian Sovereignty', 46(1) *Australian Journal of Political Science* 121-139.

[102] Andenas, M. and Andersen, C.B. (Eds.), (2012), *Theory and Practice of Harmonisation*, Edward Elgar (Cheltenham); Goode, R., (1991), 'Reflections on the Harmonisation of Commercial Law', 1991(1) *Uniform Law Review* 54-75.

[103] Castells, M., (2009), *The Rise of the Network Society*, 2nd Edn, Wiley-Blackwell (Hoboken); Krisch, N., (2014), 'The Decay of Consent: International Law in an Age of Global Public Goods', 108(1) *American Journal of International Law* 1-40, at p. 3; McCormick, J., (2017), *Understanding the European Union: A Concise Introduction*, 7th Edn, Palgrave Macmillan (London), at pp. 3-4.

[104] Boyer, R. and Drache, D., (Eds.), (1996), *States Against Markets: The Limits of Globalization*, Routledge (Abingdon); Mathews, J., (1997), 'Power Shift', 76(1) *Foreign Affairs* 50-66; Strange, S., (1996), *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press (Cambridge); Glenn, H.P., (2003), 'The Nationalist Heritage', in *Comparative Legal Studies: Traditions and Transitions*, P. Legrand and R. Munday (Eds.), 76-99, Cambridge University Press (Cambridge), at p. 99; Delbrück, J., (2010), 'The Changing Role of the State in the Globalising World Economy', in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, P.H.F. Bekker, R. Dolzer and M. Waibel (Eds.), 56-70, Cambridge University Press (Cambridge), at p. 61; Supra n. 98, Bederman, at p. 147; Horn, L., (2007), 'Globalisation, Sustainable Development and the Common Concerns of Humankind', 7 *Macquarie Law Journal* 53-80, at p. 53; Bailliet, C.M., (2012), 'Introduction', in *Non-State Actors, Soft Law and Protective Regimes: From the Margins*, C.M. Bailliet (Ed.), 1-16, Cambridge University Press (Cambridge), at p. 6.

[105] Shaffer, G.C., (2012), 'International Law and Global Public Goods in a Legal Pluralist World', 23(3) *European Journal of International Law* 669-693, at p. 671.

states is prone to defective regulation and low compliance for global public goods. In other words, any academic analysis which seeks to encourage law's development outside of the traditional framework of international law is inherently driven towards the betterment of global governance. Its normative aspirations are to explore the role of regulatory harmonisation, whether through traditional or non-traditional architecture, or top-down or bottom-up processes, which can ensure consistent, transferable, enforceable and widely observed norms *across* national boundaries, so as to prevent free riding or races to the bottom, and to facilitate cross-border coordination and integration. From another perspective, transnational law recognises the increasing stratification of transboundary regimes across multiple 'layers', ranging through global, regional, national and local.[106] For example, Halliday and Shaffer suggest that recursive interactions take place between these multiple levels of regulation, which in turn drives their development through top-down, bottom-up and side-to-side processes of norm contestation, harmonisation and cross-fertilisation.[107] Normatively, therefore, we can enhance international law by improving the coordination and productive interoperation across these levels.[108]

Transnational law also incorporates the growing role of private and semi-private actors in the administration of public tasks,[109] as well as the ability of stakeholders to self-organise and operate in the 'shadow of the law'.[110] By going beyond a monolithic view of sovereign states, it also sees that courts, agencies and other actors within states may be empowered to protect external interests, in a manner against their own state's interests.[111] It also recognises the valuable role of community norms and soft law in international governance.[112] What is more, given this recognition of normative variation across legal

[106] See Chapter 6, Section 1.
[107] Supra n. 44, Halliday and Shaffer, at pp. 16-17; Supra n. 57, Berman, at pp. 26 and 29.
[108] Ibid.
[109] Börzel, T. A. and Risse, T., (2005), 'Public-Private Partnerships: Effective and Legitimate Tools of International Governance', in *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century*, E. Grande and L.W. Pauly (Eds.), 195-216, University of Toronto Press (Toronto); Knill, C. and Lehmkuhl, D., (2002), 'Private Actors and the State: Internationalization and Changing Patterns of Governance', 15(1) *Governance* 41-63; Cafaggi, F., (2012), 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"', 23(3) *European Journal of International Law* 695-718.
[110] Whytock, C.A., (2007), 'Litigation, Arbitration, and the Transnational Shadow of the Law', 18(2) *Duke Journal of Comparative and International Law* 449-476.
[111] Benvenisti, E., (2008), 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102(2) *American Journal of International Law* 241-274; Kingsbury, B., (2009), 'Weighing Global Regulatory Rules and Decisions in National Courts', 2009(1) *Acta Juridica* 90-119; Sloss, D., (2006), 'When Do Treaties Create Individually Enforceable Rights: The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas', 45(1) *Columbia Journal of Transnational Law* 20-113.
[112] Büthe, T. and Mattli, W., (2011), *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press (Princeton); Boyle, A.E., (1999), 'Some Reflections on the

and social norms, it naturally possesses a realist's scepticism of law as posited. Indeed, as Chapter 4 and the following section demonstrate, just because international law may be written down in treaties or implemented into statute books, under a rationalist and thick realist lens it can often still carry weak obligatory force, legitimacy, compliance pull or auxiliary enforcement, diminishing its true normative traction among stakeholders.[113] Transnational law therefore looks beyond international 'law as written' and takes, as its point of exit, a sociolegal account of 'law in action'.[114] With the further consequence that, from a transnational perspective, the fields of 'law' and 'governance' become heavily intertwined.[115] As will be shown, such a critical view of positive law is therefore welcome in the ocean where, on account of its paradigmatic transnationality, formal "legal" norms have been routinely flouted or under-enforced.

3. Weaknesses of the International Law of the Sea

As Chapter 6 explores further in its introduction to 'Integrated Ocean Management', it has increasingly become the *system* of international law, rather than the content of the *laws* themselves, which has become a central focus for resolving the failing system of ocean stewardship. However, while law of the sea scholars have made ad hoc references to the issues of zonality, territorial sovereignty and state compliance, it has been remarkably rare to find commentators on the law of the sea locating the blame on the Westphalian system of inter-state law.[116] Instead, as is briefly examined in Section 4, too much focus has been unfairly placed squarely upon flag states. This section proposes that the nation state-centred focus of the ocean's legal system is particularly culpable for humankind's poor record, thus far, in regulating the ocean. In particular, it suggests that three integral and interlinked manifestations of Westphalian sovereignty – sovereign absolutism, sovereign equality and territorial sovereignty – can be found as essential weaknesses in our current law of the sea. As such, it is not flag states qua flag regulators which are necessarily at fault; but flag states qua rivalrous and self-interested sovereign states.

Relationship of Treaties and Soft Law', 48(4) *International and Comparative Law Quarterly* 901-913; Abbott, K.W. and Snidal, D., (2000), 'Hard and Soft Law in International Governance', 54(3) *International Organization* 421-456.

[113] Supra n. 53, Merry; Supra n. 60, Berman, 'Global Legal Pluralism'; Teubner, G., (1992), 'The Two Faces of Janus: Rethinking Legal Pluralism', 13(5) *Cardozo Law Review* 1443-1462; Moore, J.N., (1999), 'Enhancing Compliance with International Law: A Neglected Remedy', 39(4) *Virginia Journal of International Law* 881-1061.

[114] Supra n. 57, Berman, at p.18; Supra n. 98, Heyvaert and Etty, at p.4.

[115] Supra n. 98, Heyvaert and Etty, at p.6; Supra n. 44, Halliday and Shaffer, at p.15.

[116] See infra Subsection (d).

(a) Sovereign Absolutism

Sovereign absolutism refers to the unrestricted authority of states to assume absolute rule over their own subjects. It regards nation states as entirely unitary systems, wherein everything which relates to regulatory governance of a nation's citizens is entirely under the self-determination of a discrete and centralised authority.[117] In the maritime context, this external sovereignty has manifested itself particularly by nation states freely deciding whether or not to enter into international treaties,[118] with the end result that negotiations habitually lead to diluted, ambiguous and hortatory commitments between states.[119] What is more, assuming that recalcitrant states even agree to enter into the resulting treaty, they still possess complete discretion as to how they interpret the treaty's meaning, or implement its terms into domestic legislation and ensure its enforcement against their own citizenry.[120] As was explored in Chapter 4, however, for many global public goods,

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[117] E.g., Anderson, P., (1974), *Lineages of the Absolutist State*, New Left Books (London); Goodhart, A.L., (1958), 'The Rule of Law and Absolute Sovereignty', 106(7) *University of Pennsylvania Law Review* 943-963; Beitz, C., (1992), 'Sovereignty and Morality in International Affairs', in *Political Theory Today*, D. Held (Ed.), 236-255, Polity Press (Cambridge), at p. 239; Charvet, J., (1997), 'The Idea of State Sovereignty and the Right of Humanitarian Intervention', 18(1) *International Political Science Review* 39-48.

[118] A well-known example is the continued refusal of the United States to ratify the UN 1982 Convention on the Law of the Sea (Pollack, M.A., (2015), 'Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order', 13(4) *International Journal of Constitutional Law* 873-900, at pp. 878-879); Barrett, S., (2007), *Why Cooperate?: The Incentive to Supply Global Public Goods*, Oxford University Press (Oxford), at p. 71.

[119] Karns, M.P., Mingst, K.A. and Stiles, K.W., (2015), *International Organizations: The Politics and Processes of Global Governance*, 3rd Edn, at p. 27; Downs, G.W., Rocke, D.M. and Barsoom, P.N., (1996), 'Is the Good News about Compliance Good News about Cooperation?', 50(3) *International Organization* 379-406; Supra n. 98, Bederman, at p. 173; Barrett, S., (2003), *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford University Press (Oxford), at p. 11; Tladi, (2011), 'Ocean Governance: A Fragmented Regulatory Framework', in *Oceans: The New Frontier*, P. Jacquet, R.K. Pachauri and L. Tubiana (Eds.), 99-110, The Energy and Resources Institute (New Delhi), at p. 103; Barnes, R.A., (2012), 'The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R.A. Barnes and D. Ong (Eds.), 233-260, Oxford University Press (Oxford), at p. 239; Freestone, D., (2013), 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas', in *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, D. Freestone (Ed.), 1-8, Martinus Nijhoff (Leiden), at p. 2; Saunders, P.M., (1998), 'Development Cooperation and Compliance with International Environmental Law: Past Experience and Future Prospects', in *Trilateral Perspectives on International Legal Issues: From Theory into Practice*, T.J. Schoenbaum, J. Nakagawa and L.C. Reif (Eds.), Transnational Publishers (New York).

[120] Cohen, J.L., (2012), *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press (Cambridge), at p. 33; Pavel, C., (2014), *Divided Sovereignty: International Institutions and the Limits of State Authority*, Oxford University Press (Oxford), at p. 4; Jayasuriya, K., (1999), 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' 6(2) *Indiana Journal of Global Legal Studies* 425-456, at p. 431; Klein, N., (2015), 'Maritime Security', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 582-603, Oxford University Press (Oxford), at p. 596; Rayfuse, R., (2015), 'Regional Fisheries Management Organizations', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 439-462, Oxford University Press (Oxford), at p. 446.

such as the protection of the ocean environment, states often have more to gain individually and less to lose by weak compliance.[121]

Although rarely linked, these manifestations of sovereign absolutism are one of the principal criticisms of the present model of ocean management. First, the majority of international treaties relating to ocean management suffer from the unfortunate trade-off between invoking strong commitments and the need for widespread ratification.[122] A good example is the UN Law of the Sea Convention itself which, although a remarkable achievement in terms of comprehensive and consensus-based treaty making, did not receive support and ratification from key maritime powers until 1994, once an implementation agreement (in effect being a rewrite of Part XI) was concluded to neuter the original vision of fairly sharing the resources of the deep seabed.[123] Formal treaties also, therefore, end up with weak and precatory language, such as requiring states to 'cooperate'[124] or that they 'should' follow a course of action.[125] Often, the only way to get states to enter into international commitments is by the use of hollow language or by the development of international "soft law".[126] Naturally, however, such rules have

[121] Churchill, R., (2012), 'The Persisting Problem of Non-Compliance with the Law of the Sea Convention: Disorder in the Oceans', 27(4) *International Journal of Marine and Coastal Law* 813-820; Rayfuse, R., (2005), 'To Our Children's Children's Children: Achieving Compliance in High Seas Fisheries', 20(3) *International Journal of Marine and Coastal Law* 509-532; High Seas Task Force, (2006), *Closing the Net: Stopping Illegal Fishing on the High Seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, Sadag SA (Bellegrade), (at: https://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf; accessed 18 December 2018), at p. 24; Cameron, J., Werksman, J. and Roderick, P. (Eds.), (1995), *Improving Compliance with International Environmental Law*, Routledge (Abingdon); Gianni, M., Currie, D.E.J., Fuller, S., Speer, L., Ardron, J., Weeber, B., Gibson, M., Roberts, G., Sack, K., Owen, S. and Kavanagh, A., (2011), *Unfinished Business: A Review of the Implementation of the Provisions of UNGA Resolutions 61/105 and 64/72 Related to the Management of Bottom Fisheries in Areas Beyond National Jurisdiction*, Deep Sea Conservation Coalition (Amsterdam), (at: http://www.savethehighseas.org/publicdocs/DSCC_review11.pdf; accessed 2 January 2019).

[122] Ibid, High Seas Task Force, at pp. 44-45.

[123] Oxman, B.H., (1994), 'The 1994 Agreement and the Convention', 88(4) *American Journal of International Law* 687-696; Kirton, A. G. and Vasciannie, S. C., (2002), 'Deep Seabed Mining Under the Law of the Sea Convention and the Implementation Agreement', 51(2) *Social and Economic Studies* 63-115.

[124] E.g., A duty of 'cooperation' is also incumbent on states under the LOSC with regard to protecting living resources in the high seas (Art. 117) and protecting the marine environment (Art. 197). This has led to research which has puzzled over the precise obligations of states (e.g., Takei, Y., (2013), *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems*, Martinus Nijhoff (Leiden), at pp. 52-68; *The MOX Plant Case (Ireland v. United Kingdom), Request for provisional measures*, International Tribunal for the Law of the Sea, 3 December 2001, ITLOS Case No. 10). See also Chapter 3, Section 4.

[125] A good example of this is contained in the UNESCO Convention itself (supra n. 1), which contentiously only required that coastal states 'should' inform flag states and states with a verifiable link when their warships are discovered in the coastal state's territorial waters (Art. 7(3)).

[126] Oanta, G.A. (2014), 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda', 16 *International Community Law Review* 214-235, at pp. 223-224; Supra n. 112, Abbott and Snidal; Dupuy, P-M., (1991), 'Soft Law and the International Law of the Environment', 12(2) *Michigan Journal of International Law* 420-435; Kirton, J.J. and Trebilcock,

numerous difficulties, including weaknesses in enforceability and the lack of vigour in compliance.[127] Even through a contructivist lens which sees the gradual hardening of norms by facilitated learning and coordination,[128] compliance can be weak for extended periods of time before powerful voices are able to steer such norm producing processes.[129]

Second, it is also the ability of states to hold treaty negotiations to ransom which drives forward the hegemonic and politicised nature of ocean law. It is not coincidental that the most powerful maritime nations tend to espouse legal rules most closely aligned with international custom.[130] Such multilaterally defined laws usually favour those nations found higher in the pecking order. The excessive reliance upon flag state enforcement has suited the most powerful flag states (see infra), just as a 'first-come-first-served' system of managing resources in the high seas has suited the most industrialised nations.[131] The sudden expansion of coastal state claims in the aftermath of World War II makes much more sense when one considers that the United States, United Kingdom, Russia, France, Japan, Canada, Australia and New Zealand are in the worldwide Top 10 of exclusive economic zone (EEZ) size.[132] The subsequent conclusion of an international

M.J., (2017), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Routledge (Abingdon).

[127] Ibid, Abbott and Snidal, at pp. 426-434; Wiener, A., (2009), 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations', 35(1) *Review of International Studies* 175-193; Franck, T.M., (1998), *Fairness in International Law and Institutions*, Oxford University Press (Oxford), at p. 31; Supra n. 119, Barnes, at pp. 254-255; Brunnée, J., (2005), 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben (Eds.), 101-126, Springer (New York), at p. 116; Ardron, J.A., Rayfuse, R. Gjerde, K. and Warner, R., (2014), 'The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can be Achieved Using Existing International Agreements?', 49 *Marine Policy* 98-108, at p.101.

[128] Supra n. 126, Kirton and Trebilcock; Chayes, A. and Chayes, A.H., (1995), *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press (Cambridge, MA); Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford).

[129] See Chapter 4, Section 3(d). Shaffer, G.C. and Pollack, M.A., (2010), 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94(3) *Minnesota Law Review* 706-799; Dunne, T. and Hanson, M., (2016), 'Human Rights in International Relations', in *Human Rights: Politics and Practice*, 3rd Edn, Goodhart, M. (Ed.), 61-76, Oxford University Press (Oxford), at p. 73.

[130] Krisch, N., (2005), 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16(3) *European Journal of International Law* 369-408; Odell, R., (2016), 'Maritime Hegemony and the Fiction of the Free Sea: Explaining States' Claims to Maritime Jurisdiction', *MIT Political Science Department Research Paper*, No. 2016-21; Vagts, D.V., (2001), 'Hegemonic International Law', 95(4) *American Journal of International Law* 843-848.

[131] Schrijver, N., (2016), 'Managing the Global Commons: Common Good or Common Sink?', 37(7) *Third World Quarterly* 1252-1267.

[132] See Sea Around Us, (2016), 'Sea Around Us', (at: http://www.seaaroundus.org; accessed 1 June 2019); O'Connell, D.P., (1983), *The International Law of the Sea: Volume I*, I.A. Shearer (Ed.), Oxford University Press (Oxford), at pp. 471-472; Tuerk, H., (2013), *Reflections on the Contemporary Law of the Sea*, Martinus Nijohff (Leiden), at p. 27; Freeman, H.A., (1970), 'Law of the Continental Shelf and Ocean Resources—An Overview', 3(2) *Cornell International Law Journal* 105-120.

convention which permits these states to exclusively extract the wealth of resources in hundreds of miles offshore, but with little meaningful legal responsibility to steward the protection of their EEZ's natural environment, is therefore perhaps unsurprising. As Shaffer says, international law has 'failed to constrain power when power chose to belittle and ignore it, and it served to legitimize power when power deigned to deploy it.'[133] Seen in this light, the burgeoning naval strength of China in the South-West Pacific and their growing friction with the LOSC and the rule of law, is as unsurprising as it is predictable.[134]

An essential result of this politicisation of the law of the sea and of the freedom of states to reject or dilute international agreements is the lacking ability to compel or coerce states into assuming additional obligations or burdens.[135] This consent-based model, as introduced throughout Chapters 3 and 4, allows for commitments between states which maximise the opportunity to 'externalise' losses and minimise economic risks from ocean-based activities. The most visible example is the continual reinvocation of the system of flag state enforcement. This system for regulating ocean stakeholders – relying on the exclusive enforcement of a flag state's national legal rules within its domestic courts – provides a poor system of ocean supervision and accountability (although see subsection (b) below).[136] Given the deficient enforcement of the 'genuine link' requirement (also see below) and the fact that most flag states are distant from and indifferent to the true activities of vessels bearing their flag, many argue that sole reliance upon flag state enforcement is a formula for failure.[137] Indeed, many "flags-of-

[133] Supra n. 105, Shaffer, at p. 672.
[134] Zhang, F., (2017), 'Assessing China's Response to the South China Sea Arbitration Ruling', 71(4) *Australian Journal of International Affairs* 440-459; Roy, D., (1994), 'Hegemon on the Horizon? China's Threat to East Asian Security', 19(1) *International Security* 149-168, at pp. 163-164; Zhang, H., (2010), 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ', 9(1) *Chinese Journal of International Law* 31-47.
[135] See Chapter 3, Section 4 and Chapter 4, Section 2.
[136] Mansell, J.N.K., (2009), *Flag State Responsibility: Historical Development and Contemporary Issues*, Springer-Verlag (Berlin), at pp. 219-237; Rayfuse, R., (2004), *Non-Flag State Enforcement in High Seas Fisheries*, Martinus Nijhoff (Leiden), at pp. 17-29; Scanlon, Z., (2017), 'Addressing the Pitfalls of Exclusive Flag State Jurisdiction: Improving the Legal Regime for the Protection of Submarine Cables', 48(3) *Journal of Maritime Law and Commerce* 295-340; Supra n. 132, Tuerk, at p. 186; Chircop, A., (2015), 'The International Maritime Organisation', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 416-438, Oxford University Press (Oxford), at pp. 437-438; Barnes, R.A., (2015), 'Flag States', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 304-324, Oxford University Press (Oxford); Strati, A., (1991), 'Deep Seabed Cultural Property and the Common Heritage of Mankind', 40(4) *International & Comparative Law Quarterly* 859-894, at pp. 870-871.
[137] Ibid; Birnie, P., 'Reflagging of Fishing Vessels on the High Seas', 2(3) *Review of European Community and International Environmental Law* 270-276; Garmon, T., (2002), 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th', 27(1) *Tulane Maritime Law*

convenience" specialise in maximising the internalisation of financial gains and the externalisation of environmental or health and safety harms.[138]

Turning to the other manifestation of sovereign absolutism, being the complete freedom of states to interpret, implement and enforce resulting treaties, it is not only that such commitments between states are weak in compliance pull, but that international agreements are deliberately vague and ambiguous.[139] Examples abound in the maritime context, but some well-known examples include phrases such as 'maximum sustainable yield' under Article 119 of the LOSC and Article 5 of the 1995 UN Fish Stocks Agreement[140] and 'purposes of scientific research' under the 1946 International Convention on the Regulation of Whaling.[141] Such equivocal phrases are intentionally included to provide sufficient latitude in self-interpretation and enforcement, so as to incentivise objecting or free riding states to join the treaty regimes. While "constructive ambiguity" is the phrase often given to such phrases, an equally valid term could be "destructive ambiguity", given that such well-intentioned words are habitually flouted and interpreted in favour of self-interest in a manner destructive to the global community.[142]

This unrestricted freedom of states to interpret, implement and enforce the laws governing their citizens is at the heart of the struggling system of ocean stewardship. Its weakness

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Journal 257-276, at pp. 268-269; Zwinge, T., (2011), 'Duties of Flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So', 10(2) *Journal of International Business and Law* 297-324; Englender, D., Kirschey, J., Stöfen, A. and Zink, A., (2014), 'Cooperation and Compliance Control in Areas Beyond National Jurisdiction', 49 *Marine Policy* 186-194, at p. 186.

[138] Supra n. 137, Rayfuse, at p. 25; Shaughnessy, T. and Tobin, E., (2006), 'Flags of Inconvenience: Freedom and Insecurity on the High Seas', 5(1) *Journal of International Law* 1-31; Alderton, T. and Winchester, N., (2002), 'Globalisation and De-Regulation in the Maritime Industry', 26(1) *Marine Policy* 35-43; Alderton, T. and Winchester, N., (2002), 'Regulation, Representation and the Flag Market', 4(1) *Journal for Maritime Research* 89-105; Alderton T. and Winchester, N., (2004), 'Flag States and Safety: 1997-1999', 29(2) *Maritime Policy and Management* 151-162; Anderson, H.E., (1996), 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives', 21(1) *Tulane Maritime Law Journal* 139-170; c.f., Matlin, D.F., (1991), 'Re-Evaluating the Status of Flags of Convenience under International Law', 23(5) *Vanderbilt Journal of Transnational Law* 1017-1056.

[139] Supra nn. 119, 124-127 and 129.

[140] Supra n. 2, LOSC, Art. 119(1)(a); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (adopted 8 September 1995 (New York), in force 11 November 2001), 2167 UNTS 88, Art. 5(b).

[141] International Convention for the Regulation of Whaling, (adopted 2 December 1946 (Washington DC), in force 10 November 1948), 161 UNTS 72, Art. 8.

[142] Fischhendler, I., (2008), 'When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water', 8(1) *Global Environmental Politics* 111-136; Hansen, S. T., (2016), 'Taking Ambiguity Seriously: Explaining the Indeterminacy of the European Union Conventional Arms Export Control Regime', 22(1) *European Journal of International Relations* 192-216.

is perhaps most vividly manifested in the unconditional freedom of states to self-interpret and enforce the 'genuine link' requirement for registering vessels under Article 91 of the LOSC.[143] As flag states assume the central responsibility for managing offshore operations, it is vital that those operations possess a meaningful relationship with the supervising flag state and, more so, that they are resident within or hold identifiable assets in that country against which sanctions can be enforced. Unfortunately, open registry states (i.e., states providing flags-of-convenience), are almost entirely free to self-interpret the genuine link requirement according to their own standards.[144] Ironically, international efforts to close this critical loophole through the United Nations 1986 Convention on Conditions for Registration of Ships failed given that the intended addressees – by ultimately using this very same freedom to act autonomously – were free to simply reject the treaty.[145] In 1999, the International Tribunal on the Law of the Sea (ITLOS) had the opportunity revisit this loophole in ocean governance in the *M/V Saiga (No. 2)* case.[146] Unfortunately, the Tribunal held that the strength of a genuine link between vessel and flag state is not a matter which can be contested by others (outside the flag state itself), or a question of the quality of state regulatory oversight, but purely an administrative question of whether the flag state has been formally appointed as the registered flag state.[147]

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[143] Gauci, G.M. and Aquilina, K., (2017), 'The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – The Triumph of Formality over Substance?', 17(1) *International and Comparative Law Review* 167-191; Tache, S.W., (1982), 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link', 16(2) *The International Lawyer* 301-312; Cogliati-Bantz, V.P., (2010), 'Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law', 79(3) *Nordic Journal of International Law* 383-432; Rayfuse, R., (2010), 'The Anthropocene, Autopoiesis And The Disingenuousness Of The Genuine Link: Addressing Enforcement Gaps In The Legal Regime For Areas Beyond National Jurisdiction', in *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments*, E.J. Molenaar and A.G. Oude Elferink (Eds.), 165-190, Brill (Leiden).

[144] Wefers Bettinck, H.W., (1987), 'Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships', 18 *Netherlands Yearbook of International Law* 69-119, at p. 86; O'Connell, D.P., (1984), *The International Law of the Sea, Vol. II*, I.A. Shearer (Ed.), Oxford University Press (Oxford), at p. 760; McConnell, M.L., (1985), ''...Darkening Confusion Mounted Upon Darkening Confusion': The Search for the Elusive Genuine Link', 16(3) *Journal of Maritime Law and Commerce* 365-396, at p. 376; Guilfoyle, D., (2015), 'The High Seas', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 203-225, Oxford University Press (Oxford), at pp. 215-216.

[145] United Nations Convention on Conditions for Registration of Ships (adopted 7 February 1986 (Geneva), not yet in force), UN Doc. TD/RS/CONF/19/Add.1; Llácer, F.J.M., (2003), 'Open Registers: Past, Present and Future', 27(6) *Marine Policy* 513-523. On the need for the Convention, see Thuong, LT., (1987), 'From Flags of Convenience to Captive Ship Registries', 27(2) *Transportation Journal* 22-34; Kasoulides, G.C., (1989), 'The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry', 20(6) *Ocean Development and International Law* 543-576; Supra n. 121, High Seas Task Force, at pp. 53-54; Supra n. 136, Barnes, at p. 307.

[146] *The M/V 'SAIGA' (No 2), Saint Vincent and the Grenadines v Guinea*, International Tribunal for the Law of the Sea, Case No. 2, ICGJ 336, 1 July 1999.

[147] Ibid, M/V Saiga Case, at para. 83. See also, *The M/V 'Virginia G' Case, Panama v Guinea-Bissau*, International Tribunal for the Law of the Sea, Case No. 19, ICGJ 452, 14 April 2014, at paras. 112-113.

This failure of unencumbered internal sovereignty goes much further, for example, by enabling offshore tax havens, money laundering, asset-moving, forum shopping and the creation of impenetrably complex multiple-front company structures across multiple jurisdictions.[148] Thus, the freedom of states to craft their own regulations fails in a system which allows ocean stakeholders – i.e., legal or natural persons of a truly transnational quality – to freely select in which jurisdiction to hide assets, register front companies, hear foreign claims, align their environmental standards, access markets, and pay taxes.[149] What is more, following the conclusion of an international treaty, each national legal system will be free to interpret and implement their commitments across all sectors in an endless variety of ways, creating a complex 'horrendogram' of multiple overlapping and conflicting policies, making it even more challenging to locate norms and ensure their observance.[150] Thus, the intensive fragmentation of policy does not just create great uncertainty of ocean law, but the wide berth for different interpretations also creates wide space for indifferent implementation.[151]

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[148] Supra n. 18, Langewiesche; George, R., (2013), *Deep Sea and Foreign Going: Inside Shipping, the Invisible Industry That Brings You 90% of Everything*, Portobello Books (London); Telesetsky, A., (2014), 'Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime', 41(4) *Ecology Law Quarterly* 939-998; Lindley, J. and Techera, E. J., (2017), 'Overcoming Complexity in Illegal, Unregulated and Unreported Fishing to Achieve Effective Regulatory Pluralism', 81 *Marine Policy* 71-79; Lee, J.C., Croft, S. and McKinnel, T., (2018), *Misery at Sea: Human Suffering in Taiwan's Distant Water Fishing Fleet – Greenpeace Report*, Greenpeace East Asia (Taiwan), (at: http://m.greenpeace.org/eastasia/Global/eastasia/publications/campaigns/Oceans/Misery_at_Sea-Final1.pdf; accessed 2 January 2019), at pp. 56-61; Miller, D.D. and Sumaila, U.R., (2014), 'Flag Use Behavior and IUU Activity Within the International Fishing Fleet: Redefining Definitions and Identifying Areas of Concern', 44 *Marine Policy* 204-211.

[149] Galaz, V., Crona, B., Dauriach, A., Jouffray, J. B., Österblom, H. and Fichtner, J., (2018), 'Tax Havens and Global Environmental Degradation', 2 *Nature Ecology and Evolution* 1352–1357; Wells, J.M., (1981), 'Note, Vessel Registration in Selected Open Registries', 6(2) *Maritime Lawyer* 221-246; Fink, L., (2014), *Sweatshops at Sea: Merchant Seamen in the World's First Globalized Industry, from 1812 to the Present*, University of North Carolina Press (Chapel Hill); Gregory, W.R., (2012), *Flags of Convenience: The Development of Open Registries in the Global Maritime Business and the Implications for Modern Seafarers*, MA Thesis, Georgetown University, (at: https://repository.library.georgetown.edu/bitstream/handle/10822/557688/Gregory_georgetown_0076M_11950.pdf; accessed 2 January 2019); Rogers, R., (2010), *Ship Registration: A Critical Analysis*, MSc Thesis, World Maritime University, (at: http://commons.wmu.se/all_dissertations/447; accessed 2 January 2019).

[150] Boyes, S.J. and Elliott, M., (2014), 'Marine Legislation – The Ultimate 'Horrendogram': International law, European Directives & National Implementation', 86(1-2) *Marine Pollution Bulletin* 39-47; Supra n. 120, Klein, at pp. 595-596.

[151] Duruigbo, E., (2001), 'Multinational Corporations and Compliance with International Regulation Relating to the Petrolum Industry', 7(1) *Annual Survey of International and Comparative Law* 101-146; Knudsen, O.F. and Hassler, B., (2011), 'IMO Legislation and its Implementation: Accident Risk, Vessel Deficiencies and National Administrative Practices', 35(2) *Marine Policy* 201-207; Cavallo, M., Elliott, M., Touza, J. and Quintino, V., (2017), 'Benefits and Impediments for the Integrated and Coordinated Management of European Seas', 86 *Marine Policy* 206-213; Rosenberg, A.A., Mooney-Seus, M.L., Kiessling, I., Mogensen, C.B., O'Boyle, R. and Peacey, J., (2009), 'Lessons from National-Level Implementation Across the World' in *Ecosystem-Based Management for the Oceans*, K. McLeod and H. Leslie (Eds.), 294-313, Island Press (Washington DC); Techera, E.J. and Klein, N., (2011), 'Fragmented Governance: Reconciling Legal Strategies for Shark Conservation and Management', 35(1) *Marine Policy* 73-78.

The freedom to self-interpret and self-enforce leads to the under-enforcement of any commitments negatively impacting on economic activity for internal citizens; often being the same agreements which are in need of more stringent international compliance.[152] Because international commitments are arranged horizontally between political sovereigns, their subsequent enforcement relies on a complex, costly and arguably cumbersome system of inter-state bilateral and diplomatic enforcement: in other words, an identifiably 'injured' state needs to invest valued political resources in direct enforcement against an evidentially 'culpable' state.[153] Not only is there an indirect form of accountability, but all transnational ocean users must petition their own nation state to take on their litigative mantle, creating a complex, expensive and indirect route between two "foreign" stakeholders (e.g., Stakeholder A < > State A < > State B < > Stakeholder B).[154] Nollkaemper gives the example of fishermen in the North Sea who brought a claim against the German government alleging that a permit authorising a factory to dump acid in the North Sea, which killed and deformed many fish stocks which they relied on, was in breach of the London Convention[155] and the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, ratified by Germany.[156] Although there was clear evidence of contravention with these agreements, the Federal Administrative Court of Hamburg was able to reject the claim on the basis that these international agreements were between *states* and did not found private rights.[157]

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[152] Ibid; Supra n. 121, High Seas Task Force, at p. 24; See Chapter 4.

[153] Klabbers, J., (2008), 'Compliance Procedures', in *Oxford Handbook on International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 995-1009, Oxford University Press (Oxford), at p. 1002; Supra n. 20, Harrison, at p. 41; Chinkin C. and Sadurska, R., (1991), 'The Anatomy of International Dispute Resolution', 7(1) *Ohio State Journal on Dispute Resolution* 39-82, at pp. 54-55 and 78-79; Guzman, A.T., (2002), 'The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms', 31(2) *Journal of Legal Studies* 303-326; Hoffman, K.B., (1976), 'State Responsibility in International Law and Transboundary Pollution Injuries', 25(3) *International & Comparative Law Quarterly* 509-542; Voigt, C., (2008), 'State Responsibility for Climate Change Damages', 77(1) *Nordic Journal of International Law* 1-22; Supra n. 119, Barnes, at p. 239; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, (adopted November 2001), Supplement No. 10 (A/56/10), (at: https://www.refworld.org/docid/3ddb8f804.html; accessed 2 January 2019), Art. 42.

[154] Higgins, R., (1995), *Problems and Process: International Law and How We Use It*, Oxford University Press (Oxford), at pp. 51-52; Holsti, K.J., (2004), *Taming the Sovereigns: Institutional Change in International Politics*, Cambridge University Press (Cambridge), at p. 169; Supra n. 93, Nollkaemper; Bodansky, D. and Brunnée, J., (1998), 'The Role of National Courts in the Field of International Environmental Law', 7(1) *Review of European Community & International Environmental Law* 11-20, at p. 17; Brilmayer, L., (1991), 'International Law in American Courts: A Modest Proposal', 100(8) *Yale Law Journal* 2277-2314; Vazquez, C.M., (1992), 'Treaty-Based Rights and Remedies of Individuals', 92(5) *Columbia Law Review* 1082-1163; Supra n. 119, Karns and Mingst, at p. 10.

[155] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, (adopted 29 December 1972 (London), in force 30 August 1975), 10461 UNTS 120.

[156] Case referred to at supra n. 93, Nollkaemper, at pp. 177-178; Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, (adopted 15 February 1972 (Oslo), in force 7 April 1974), 932 UNTS 3.

[157] Supra n. 93, Nollkaemper, at pp. 177-178

Furthermore, after State B has disputed the jurisdiction of the claim, the horizontal nature of sovereign equal state relations effectively minimises available sanctions and further neutralises the effectiveness of the adjudicatory process (see also subsection (b) below). This emphasis on state interests and state responsibility, providing freedom to discount the *external* interests of the international community or the *internal* interests of one's national community, also leads to a problematic mismatch in the allocation of governance authority and, often, to introverted and inconsiderate decision-making in areas with transnational impacts.[158] Certainly, there are movements in the right direction, towards new,[159] cosmopolitan,[160] interdependent,[161] relational,[162] responsible[163] post-Westphalian,[164] and contingent or conditional forms of sovereignty;[165] but these

[158] Falk, R.A., (1995), *On Humane Governance: Toward a New Global Politics*, Pennsylvania State University Press (University Park); Dryzek, J.S., (1999), 'Transnational Democracy', 7(1) *Journal of Political Philosophy* 30-51; Supra n. 43, Cutler; Benvenisti, E., (2013), 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *American Journal of International Law* 295-333; Scholte, J.A., (2000), *Globalization: A Critical Introduction*, 2nd Edn, Palgrave Macmillan (London), at pp. 348-381; Low, M., (1997), 'Representation Unbound: Globalization and Democracy', in *Spaces of Globalization: Reasserting the Power of the Local*, K.R. Cox (Ed.), 240-280, Guilford Press (New York); Held, D., (2000), 'The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization', in *Global Democracy: Key Debates*, B. Holden (Ed.), 17-31, Routledge (Abingdon); Held, D. and Koenig-Archibugi, M. (Eds.), (2005), *Global Governance and Public Accountability*, Blackwell (Oxford).

[159] Supra n. 128, Chayes and Chayes; Lake, D.A., (2003), 'The New Sovereignty in International Relations', 5(3) *International Studies Review* 303-323.

[160] Adelman, S., (2011), 'Cosmopolitan Sovereignty', C.M. Bailliet and K.F. Aas (Eds), 11-28, Routledge (Abingdon); Held, D., (2002), 'Law of States, Law of Peoples: Three Models of Sovereignty', 8(1) *Legal Theory* 1-44; Beck. U., (2006), *The Cosmopolitan Vision*, Polity Press (Cambridge).

[161] Perrez, F.X., (2000), *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, Brill (Leiden); Ţuţuianu, S.U., (2012), *Towards Global Justice: Sovereignty in an Interdependent World*, Springer (New York); Diehl, P.F. (Ed.), (2005), *The Politics of Global Governance: International Organizations in an Interdependent World*, 3rd Edn, Lynne Rienner (Boulder); Schrijver, N., (1997), *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge University Press (Cambridge).

[162] Stacy, H., (2003), 'Relational Sovereignty', 55(5) *Stanford Law Review* 2029-2060; Criddle, E.J., (2012), 'Proportionality in Counterinsurgency: A Relational Theory', 87(3) *Notre Dame Law Review* 1073-1112.

[163] Deng F.M., Kimaro S., Lyons T., Rothchild D. and Zartman D., (1996), *Sovereignty as Responsibility: Conflict Management in Africa*, Brookings Institution Press (Washington DC); Bellamy A.J, (2009) *Responsibility to Protect*, Polity Press (Cambridge); Glenville, L., (2013), 'The Myth of "Traditional" Sovereignty', 57(1) *International Studies Quarterly* 79-90.

[164] Jacobsen, T., Sampford C. and Thukur, R., (Eds.), (2008), *Re-Envisioning Sovereignty: The End of Westphalia?*, Ashgate Publishing (Farnham); Engel, E.A., (2004), 'The Transformation of the International Legal System: The Post-Westphalian Legal Order', 23(1) *Quinnipiac Law Review* 23-46; Lansford, T., (2000), 'Post-Westphalian Europe? Sovereignty and the Modern Nation State', 37(1) *International Studies* 1-15; Dryzek, J.S., (2012), 'Global Civil Society: The Progress of Post-Westphalian Politics', 15 *Annual Review of Political Science* 101-119.

[165] Elden, S., (2006), 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders', 26(1) *SAIS Review of International Affairs* 11-24; Mathieu, X., (2018), 'Sovereign Myths in International Relations: Sovereignty as Equality and the Reproduction of Eurocentric Blindness', *Journal of International Political Theory* (Forthcoming); Dietsch, P., (2011), 'Rethinking Sovereignty in International Fiscal Policy', 37(5) *Review of International Studies* 2107-2120; Knell, K.E., (2018), 'A Doctrine of Contingent Sovereignty', 62(2) *Orbis* 313-334.

painstaking developments are perhaps better seen as a (very) slowly emerging byproduct of globalisation and gradual universal integration.[166] They do not, therefore, excuse traditional norms of non-intervention and firm sovereign boundaries as culprits for our presently failing global environmental stewardship. Most palpably, they tend to represent idealised or aspirational concepts of international relations, rather than truly depicting the allocation of legal authority. What is more, as discussed in Chapter 4, they are more a gradual process of states reacting to political crises, routinely after-the-event and following catastrophic destruction, as a result of the ensuing media coverage and political lobbying. The Westphalian expectation of *exclusivity* of national jurisdiction, along with its intense distrust of systems of shared responsibility, also therefore forces the hand of law of the sea and its arbiters to towards maintaining the status quo.[167]

Just as critically, it is this stringent doctrine of sovereign absolutism which promotes the widespread norm of non-interference.[168] Jackson once went so far as to describe non-intervention as a grundnorm of Westphalian sovereignty[169] and, certainly, the feature that particularly provides our oceans with an aura of lawlessness is the customary norm that flagrant rule-breakers can only be interdicted under very narrow circumstances.[170] While

[166] Supra n. 158, Benvenisti; Criddle, E.J. and Fox-Decent, E., (2009), 'A Fiduciary Theory of Jus Cogens', 34(2) *Yale Journal of International Law* 331-387; Supra n. 154, Holsti, at p. 135.
[167] Nollkaemper, A. and Jacobs, D., (2013), 'Shared Responsibility in International Law: A Conceptual Framework', 34(2) *Michigan Journal of International Law* 359-438. See supra n. 2, LOSC, Art. 92(1) ('Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.'); See also supra 154, ILC Draft Articles on State Responsibility.
[168] Charter of the United Nations, (adopted 26 June 1945 (San Francisco), in force 24 October 1945), 1 UNTS XVI, Art. 2(7); Lyons, G.M. and Mastanduno, M., (1995), 'Introduction: International Intervention, State Sovereignty, and the Future of International Society', in *Beyond Westphalia?: National Sovereignty and International Intervention*, G.M. Lyons and M. Mastanduno (Eds.), 1-20, Johns Hopkins University Press (Baltimore); Vincent, R.J., (1974), *Nonintervention and International Order*, Princeton University Press (Princeton); Weber, C., (1992), 'Reconsidering Statehood: Examining the Sovereignty/Intervention Boundary', 18(3) *Review of International Studies* 199-216; Mayall, J., (1991), 'Non-Intervention, Self-Determination and the 'New World Order', 67(3) *International Affairs* 421-429; Mills, A., (2014), 'Rethinking Jurisdiction in International Law', 84(1) *British Yearbook of International Law* 187-239.
[169] Jackson, R.H., (1990), *Quasi-States: Sovereignty, International Relations, and the Third World*, Cambridge University Press (Cambridge), at p. 3.
[170] Supra n. 2, LOSC, Arts. 92 and 110; van Zwanenberg, A., (1961), 'Interference with Ships on the High Seas', 10(4) *International and Comparative Law Quarterly* 785-817; Syrigos, A., (2006), 'Developments on Interdiction of Vessels on the High Seas', in *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After*, A. Strati, M. Gavouneli and N. Skourtos (Eds.), 149-202, Martinus Nijhoff (Leiden); Reuland, R.C.F., (1989), 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction', 22(5) *Vanderbilt Journal of Transnational Law* 1161-1229; Klein, N., (2007), 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', 35(2) *Denver Journal of International Law and Policy* 287-332; Papastavridis, E., (2013), *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Hart (Oxford); Stephens, T. and Rothwell, D.R., (2013), 'UNCLOS Framework for Maritime Jurisdiction and Enforcement 30 Years On', in *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, D. Freestone (Ed.), 27-36, Martinus Nijhoff (Leiden), at p. 32.

in the EEZ the number of circumstances under which a coastal state can intercept or regulate non-state vessels is somewhat greater than on the High Seas, it is still limited to specific and discrete conflicts with the coastal state's *economic* interests, thus leaving out many wider security issues such as military operations, organised crime and environmental crime, as well as being narrowed prescriptively to agreed international rules, such as those negotiated by the IMO.[171] This guarding of flagged vessels roaming the oceans from any interference is not the underlying notion of the Mare Liberum, as frequently misunderstood,[172] but is a wholly Westphalianist idea which understands all citizens as being governed exclusively by their own national governments, with no other nation or institution permitted to intervene or share supervision.[173] This system not only results in flag states undertaking regulatory "supervision" from jurisdictions with no practical connection to activities and located thousands of miles away, but also permits them wide latitude in the design and enforcement of the standards against which their fleet – bringing a vital source of income to that state – are monitored. Countless reports of under-enforcement and poor supervision by flag states abound.[174] So defective is the resulting system of flag state supervision that criminal oceangoing vessels have been

[171] Ibid, Klein, at pp. 315-316; McClaughlin, R., (2016), 'Authorizations for Maritime Law Enforcement Operations', 98(902) *International Review of the Red Cross* 465-490, at pp. 478-479; Bardin, A., (2002), 'Coastal State's Jurisdiction over Foreign Vessels', 14(1) *Pace International Law Review* 27-76; Galdorisi, G.V. and Kaufman, A.G., (2002), 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict, 32(2) *California Western International Law Journal* 253-302; c.f., Van Dyke, J.M., (2005), 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone', 29(2) *Marine Policy* 107-121; Andreone, G., (2015), 'The Exclusive Economic Zone', in *The Oxford Handbook on the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 159-180, Oxford University Press (Oxford), at pp. 176-177.

[172] Pomeroy, R.S., (1993), 'Clearing up Some Misconceptions: Open Access vs. Common Property', 16(1) *Naga* 40-41; Berkes, F., (1994), 'Property Rights and Coastal Fisheries', in *Community Management and Common Property of Coastal Fisheries in Asia and the Pacific: Concepts, Methods and Experiences*, R.S. Pomeroy (Ed.), 51-62, International Center for Living Aquatic Resources Management (Manila), at p. 54; Bromley, D.W., (1992), 'The Commons, Property, and Common-Property Regimes', in *Making the Commons Work: Theory, Practice & Policy*, D.W. Bromley (Ed.), 3-16, Institute for Contemporary Studies (San Francisco), at p. 4

[173] Supra n. 168.

[174] Supra n. 149; Human Rights at Sea, (2018), *Flag States and Human Rights: A Study On Flag State Practice In Monitoring, Reporting And Enforcing Human Rights Obligations On Board Vessels*, University of Bristol Human Rights Implementation Centre in association with Human Rights at Sea (Havant), (at: https://www.humanrightsatsea.org/wp-content/uploads/2018/07/HRAS_Bristol_University_First_Flag_State_Human_Rights_Report_July_20181.pdf: accessed 2 January 2019); DeSombre, E.R., (2006), *Flagging Standards: Globalization and Environmental, Safety, and Labor Regulations at Sea*, MIT Press (Cambridge, MA); Anderson, H.E., (1996), 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives', 21(1) *Tulane Maritime Law Journal* 139-170; Supra n. 148, Miller and Sumaila; Toh, R.S. and Phang, S-Y., (1993), 'Quasi-Flag of Convenience Shipping: The Wave of the Future', 33(2) *Transportation Journal* 31-39; Supra n. 121, High Seas Task Force, at pp. 52-53.

referred to as 'neglectful',[175] 'outlaws',[176] 'lawless',[177] 'mobile pockets of sovereignty',[178] 'sovereign islands',[179] 'delinquent',[180] 'a law unto themselves'[181] and where, given strong links between organised crime and poor flag state supervision, rogue vessels have been synonymised with piracy.[182]

(b) Sovereign Equality

Like sovereign absolutism, sovereign equality also holds that all states are self-governing and unitary. However, it is more concerned with the obstinately horizontal nature of state relations.[183] As an important principle for preventing a world ordered by military or

[175] Goss, R., (1994), 'Safety in Sea Transport', 28(1) *Journal of Transport Economics and Policy* 99-110, at p. 101.
[176] Supra n. 18, Langewiesche.
[177] Casado, C., (2004), 'Vessels on the High Seas: Using a Model Flag State Compliance Agreement to Control Marine Pollution', 35(2) *California Western International Law Journal* 203-236, at p. 204; George, R., (2011), 'Flying the Flag, Fleeing the State', 24 April 2011, *The New York Times*, (at: https://www.nytimes.com/2011/04/25/opinion/25george.html; accessed 4 January 2019); Sellen, S., (2017), 'Man disappears from bulk carrier heading to Hay Point', 13 January 2017, *Daily Mercury*, (at: https://www.dailymercury.com.au/news/man-disappears-from-bulk-carrier-heading-to-hay-po/3131571/; accessed 4 January 2019).
[178] Supra n. 121, High Seas Task Force, at p. 35.
[179] Frantz, D., (1998), 'Sovereign Islands: A Special Report – On Cruise Ships, Silence Shrouds Crimes', 11 November 1998, *The New York Times*, (at: https://www.nytimes.com/1998/11/16/us/sovereign-islands-a-special-report-on-cruise-ships-silence-shrouds-crimes.html; accessed 4 January 2019); Frantz, D., 'Sovereign Islands: A Special Report – Gaps in Sea Laws Shield Pollution by Cruise Lines', 3 January 1999, *The New York Times*, (at: https://www.nytimes.com/1999/01/03/us/sovereign-islands-special-report-gaps-sea-laws-shield-pollution-cruise-lines.html; accessed 4 January 2019).
[180] Warner, R.M., (2015), 'Conserving Marine Biodiversity in Areas Beyond National Jurisdiction Co-Evolution and Interaction with the Law of the Sea', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 752-776, Oxford University Press (Oxford), at p. 755.
[181] Peters, K., (2011), 'Sinking the Radio 'Pirates': Exploring British Strategies of Governance in the North Sea, 1964-1991', 43(3) *Area* 281-287, at p. 284.
[182] Dahlvang, N., (2006), 'Thieves, Robbers, and Terrorists: Piracy in the 21st Century', 4(1) *Regent Journal of International Law* 17-46; (2006), Liss, C., (2011), *Oceans of Crime: Maritime Piracy and Transnational Security in Southeast Asia and Bangladesh*, Institute of Southeast Asian Studies (Singapore); Supra n. 145, Llácer, at p. 516; Luft, G. and Korin, A., (2004), 'Terrorism Goes to Sea', 83(6) *Foreign Affairs* 61-71, at p. 70. On the links between organised criminal activities in the ocean environment, see, e.g., UNODC, (2011), *Transnational Organized Crime in the Fishing Industry*, United Nations Office on Drugs and Crime (Vienna), (at: http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf; accessed 2 January 2019); EJF, (2007), *Pirate Fish on your Plate – Tracking Illegally-Caught Fish from West Africa into the European Market*, Environmental Justice Foundation (London), (at: https://ejfoundation.org/resources/downloads/pirate_fish_on_your_plate_ejf.pdf; accessed 4 January 2019); Supra n. 148, Telesetsky.
[183] Supra n. 168, UN Charter, Art. 2(1); 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. […] Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.' (UN General Assembly, (1970), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc. A/RES/2625(XXV), (at: https://www.refworld.org/docid/3dda1f104.html; accessed 4 January 2019), at Principle 3); Kooijmans, P.H., (1964), *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*, Sijthoff (Leiden); Kingsbury, B., (1998), 'Sovereignty and Inequality', 9(4) *European Journal of International Law* 599-625; Lee, T.H., (2004), 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today', 67(4) *Law and Contemporary Problems* 147-167; Roth, B.R., (2012),

economic power, the equal treatment of states accords identical legal rights and responsibilities to each state.[184] In reality, however, it is the strict interpretation of sovereign equality and the routine treatment of all states as equals which further propagates the consent-based order of international law, removing any hierarchy of authority and, with it, any capacity to compel or coerce states into producing global public goods.[185] Indeed, states have equality of responsibilities, opportunities and rights to self-governance, despite *actual* asymmetries in effective responsibility, opportunity, or capacity.[186] Ironically, it has therefore been found to derail distributive justice and sustain illiberal democracies through the permitting of all nations to receive equal authority, even if their internal systems are corrupt or harmful to social and environmental interests.[187]

The resulting horizontalism, while it is intended to minimise anarchy and hegemony, still results in ineffective powers of enforcement and ensures that international law is built around the same power politics and is habitually undermined by its realist limitations.[188]

'Sovereign Equality and Non-Liberal Regimes', 43 *Netherlands Yearbook of International Law* 25-52; Kelsen, H., (1944), 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53(2) *Yale Law Journal* 207-220.

[184] Ibid; Cohen, J.L., (2004), 'Whose Sovereignty? Empire Versus International Law', 18(3) *Ethics & International Affairs* 1-24; Moslemi, B. and Babaeimehr, A., (2016), 'Principle of Sovereign Equality of States in the Light of the Doctrine of Responsibility to Protect', 1(1) *International Journal of Humanities and Cultural Studies* 687-697; Stirk, P.M., (2012), 'The Westphalian Model and Sovereign Equality', 38(3) *Review of International Studies* 641-660; Klein, R.A., (1974), *Sovereign Equality Among States: The History of An Idea*, University of Toronto Press (Toronto).

[185] Supra n. 183, Roth, at pp. 30-31; Kokott, J., (2011), 'States, Sovereign Equality', in *Max Planck Encyclopedia of Public International Law*, (at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1113; accessed 4 January 2019), at paras. 26-34; Supra n. 183, Kelsen; Viola, L.A., Snidal, D. and Zürn, M., 'Sovereign (In)Equality in the Evolution of the International System', in *The Oxford Handbook of Transformations of the State*, S. Leibfried, E. Huber, M. Lange, J.D. Levy, F. Nullmeier and J.D. Stephens (Eds.), 221-236, Oxford University Press (Oxford); Guzman, A.T., (2011), 'The Consent Problem in International Law', Berkeley Program in Law and Economics, Working Paper Series, (at: https://escholarship.org/content/qt04x8x174/qt04x8x174.pdf; accessed 4 January 2019); '[T]he principle of consent, one of the early essential norms of international law, has not been overturned […]. The fundamental rule that states are not bound by treaties to which they object remains intact. Yet, some argue today that *international consensus* provides one basis for creating new universal obligations [but such processes do not] create new obligations for all except those states that explicitly refuse to acknowledge them. Consensus thus does not replace consent' (Supra n. 154, Holsti, at p. 168).

[186] Bain, W., (2003), 'The Political Theory of Trusteeship and the Twilight of International Equality', 17(1) *International Relations* 59-77; Preuß, U.K., (2008), 'Equality of States - Its Meaning in a Constitutionalized Global Order', 9(1) *Chicago Journal of International Law* 17-50; Donnelly, J., (2006), 'Sovereign Inequalities and Hierarchy in Anarchy: American Power and International Society', 12(2) *European Journal of International Relations* 139-170; Besson, S., (2011), 'Sovereignty, International Law and Democracy', 22(2) *European Journal of International Law* 373-387; Ibid, Viola, Snidal and Zürn; c.f., supra n. 183, Kingsbury.

[187] Supra n. 183, Roth; Blake, M., (2001), 'Distributive Justice, State Coercion, and Autonomy', 30(3) *Philosophy & Public Affairs* 257-296.

[188] Supra n. 93, Nollkaemper, at p. 175; Allott, P., (1988), 'State Responsibility and the Unmaking of International Law', 29(1) *Harvard International Law Journal* 1-26; Supra n. 119, Barnes, at pp. 239-240; Vogler, J., (2012), 'Global Commons Revisited', 3(1) *Global Policy* 61-71, at p. 69; Jillions, A., (2012), 'Commanding the Commons: Constitutional Enforcement and the Law of the Sea', 1(3) *Global Constitutionalism* 429-454; Guzman, A.T., (2008), 'International Tribunals: A Rational Choice Analysis', 157 *University of Pennsylvania Law Review* 171-236, at pp. 178-182; Strauss, A.L., (1999), 'Overcoming

The continued refusal of Japan to follow the rulings of the International Whaling Commission,[189] the refusal by the Russian Federation to recognise the compulsory jurisdiction and ruling of the Permanent Court of Arbitration in the *Arctic Sunrise* case in 2015,[190] and the similar refusal of China to recognise the arbitration panel's compulsory jurisdiction and ruling 2016, in which it rejected their amassing territorial claims in the South China Sea,[191] are all notorious examples of this freedom of the system's sole intended objects to reject unfavourable interpretations of the law. The requirement of equality also opens the space for conflict over the potential hierarchisation of international norms,[192] thus potentially bulwarking defences against anything beyond a narrow interpretation of peremptory or erga omnes norms intended to provide for universal responsibility. In its external manifestation, as with absolutism discussed above, this equality also gives states the power to ritually contest the jurisdiction, or worse, legitimacy, of external institutional processes.[193] As a result, they also habitually prefer to avoid politically transparent and expensive adjudicatory processes and resolve matters through drawn out and obstacle-riven diplomatic channels.[194] This not only breeds uncertainty and indecision, but reduces the opportunities to clarify or develop international legal jurisprudence.[195] This then becomes compounded by the narrow focus

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the Dysfunction of the Bifurcated Global System: The Promise of a People's Assembly', 9(2) *Transnational Law and Contemporary Problems* 489-512.

[189] Wakamatsu, M., Shin, K.J., Wilson, C. and Managi, S., (2017), 'Can Bargaining Resolve the International Conflict over Whaling?', 81 *Marine Policy* 312-321; Wichert, R.N. and Nussbaum, M.C., (2017), 'Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission', 18(3) *Journal of Human Development and Capabilities* 356-369.

[190] *The Arctic Sunrise Case, Netherlands v Russian Federation*, Provisional Measures, International Tribunal for the Law of the Sea, 22 November 2013, Case No. 22, ICGJ 455; *The Arctic Sunrise Arbitration, Netherlands v Russia*, Award on the Merits, Permanent Court of Arbitration, 14 August 2015, Case No. 2014-02, ICGJ 511; Caddell, R., (2014), 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea', 45 *Netherlands Yearbook of International Law* 358-384; Oude Elferink, A.G., (2014), 'The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension', 29(2) *International Journal of Marine and Coastal Law* 244-289.

[191] *South China Sea Arbitration, Philippines v China*, Permanent Court of Arbitration, 12 July 2016, Case No. 2013-19, ICGJ 495; Zhao, S., (2018), 'China and the South China Sea Arbitration: Geopolitics Versus International Law', 27 *Journal of Contemporary China* 1-15; Phan, H. D. and Nguyen, L. N., (2018), 'The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions', 8(1) *Asian Journal of International Law* 36-50; Hong, N., (2018), 'The South China Sea Arbitration: A Test for the Efficacy of Compulsory Mechanism of UNCLOS and Implications for Dispute Management in the Region', 10(2) *Asian Politics & Policy* 219-246.

[192] Shelton, D., (2014), 'International Law and 'Relative Normativity'', in *International Law*, 4th Edn, M.D. Evans (Ed.), 137-165, Oxford University Press (Oxford), at p. 138.

[193] Supra n. 188; Charney, J.I., (1998), 'Third Party Dispute Settlement and International Law', 36(1) *Columbia Journal of Transnational Law* 65-89, at pp. 66-67.

[194] Romano, C.P.R., (2008), 'International Dispute Settlement', in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 1036-1056, Oxford University Press (Oxford), at p. 1041; Gent, S.E., (2013), 'The Politics of International Arbitration and Adjudication', 2(1) *Penn State Journal of Law & International Affairs* 66-77.

[195] Supra n. 126, Oanta, at p. 230; Hey, E., (2016), *Advanced Introduction to International Environmental Law*, Routledge (Abingdon), at p. 122.

of states upon economic or political interests when justifying the pursuit of international claims, which further limits the opportunity for hearing and advancing the rules of responsibility for producing global goods, such as protecting the international environment.[196]

It could also be said that this notion of 'inter-national' relations promotes a system of constant competition between states. An inalienable right to undertake a course of action free from interference in one state permits that state to freely produce externalities, which can only be absorbed by *another* state. As was explored in Chapter 4, given the harmful interoperation of free riding and Prisoner's Dilemma, states operating as equal bargaining agents usually treat international relations as a zero or negative sum game, wherein selfish decision-making can still be rewarded; and altruism – causing short-term socioeconomic loss to one's own citizens – risks punishment.[197] A system of inter-national relations, in which states can, consciously or unconsciously, externalise losses and maximise gains, provides the perfect environment for regulatory 'races to the bottom', wherein states are forced to compete for limited available resources.[198] It also locks states into zero-sum games where they fear that a strategy of abatement, such as from the presently unsustainable subsidisation of industrial-scale fishing, will lead to considerable economic losses for them in exchange for gains to free riders.[199] In other words, the Westphalian system is built entirely around a false belief of "independence", while a globalised and transnational world can only ever be "interdependent".

The drive to attract ship registrations, processing fees, company registrations and legal fees incentivises states in a competition to offer flags or ports of convenience.[200] The more that a state can externalise losses, such as ensuring that environmental degradation takes place overseas or that foreign citizens are unable to pursue economic claims against its nationals, the more it can profit. States locked in this competition for maritime business are all treated as equals, regardless of whether they actually possess the necessary resources, expertise or regulatory infrastructure to properly supervise their

[196] Ibid.
[197] See Chapter 4.
[198] Supra n. 44, Jackson, at pp. 791-792; Paulus, A., (2012), 'Whether Universal Values Can Prevail Over Bilateralism and Reciprocity', in *Realizing Utopia: The Future of International Law*, A. Cassese (Ed.), 89-104, Oxford University Press (Oxford).
[199] Telesetsky, A., (2013), 'Follow the Leader: Eliminating Perverse Global Fishing Subsidies Through Unilateral Domestic Trade Measures', 65(2) *Maine Law Review* 627-649; Stone, C.D., (1997), 'Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries', 24(3) *Ecology Law Quarterly* 505-544; Supra n. 121, High Seas Task Force, at p. 49.
[200] Supra n. 174; Supra n. 138, Shaughnessy and Tobin; Supra n. 149, Wells.

flagged vessels or enforce legislation – which, in the majority of cases, they do not.[201] Under-enforcement and turning a blind eye therefore become the norm for popular ports and flag state regulators.[202] As discussed in Chapter 4, states locked in such negative spirals will find it immensely difficult to break out of destructive patterns within a consent-based legal system. Only through hundreds of ongoing interactions can actors 'repeat games', thus building up trust and goodwill so as to enable them to agree normatively effective rules or better systems of enforcement. Nevertheless, while each state has the equal and unrestricted freedom to externalise losses – particularly by avoiding 'unequal' regulatory oversight from a higher order or a collective of foreign states – the temptation to free ride or pull out from efforts at regulatory integration can continue to undermine collaborative efforts, particularly where states lack true political or economic incentives to constrain their own sovereign freedom.

These harmful effects of horizontalism are pervasive, even between politically friendly nations. For example, regional fisheries management organisations (RFMOs) were specifically intended to remove comparative trade-offs between states in a regional context and to ensure coordination and the collective raising of regional standards but, even here, inter-national competition and pathologies of free riding can be witnessed just as strongly.[203] For example, Rothwell highlights how between regional neighbours the achievement of effective cooperation is still entirely contingent on the 'overall political relationship between the States concerned, cultural and socio-economic divergences, the presence or absence of pervasive territorial or maritime disputes, the significance accorded to and prioritizing of oceans management by individual States, the effective implementation of regional instruments by individual States, the nature and extent of sea-based activities and financial resources and capacity.'[204] Indeed, the rejection by UK voters of regionally integrated collective gains in the 2016 Brexit referendum

[201] Supra nn. 174 and 182; Jacobson, H.K. and Brown Weiss, E., (1995), 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project', 1(2) *Global Governance* 119-148, at pp. 127-129; Supra n. 121, High Seas Task Force, at pp. 24, 32 and 46-48; Supra n. 144, Guilfoyle, at p. 224.
[202] Ibid.
[203] Supra n. 120, Rayfuse; Supra n. 180, Warner, at pp. 759-761; Wright, G., Rochette, J., Blom, L., Currie, D., Durussel, C., Gjerde, K. and Unger, S., (2016), *High Seas Fisheries: What Role for a New International Binding Instrument?*, Study No. 3/2016, IDDRI (Paris), (at: https://www.iddri.org/sites/default/files/import/publications/st0316_gw-et-al._fisheries-bbnj.pdf; accessed 4 January 2019), at pp. 8-9; Cullis-Suzuki, S. and Pauly, D., (2010)', 'Failing the High Seas: A Global Evaluation of Regional Fisheries Organizations', 34(5) *Marine Policy* 1036-1042.
[204] Rothwell, D.R., Oude Elferink, A.G., Scott, K.N. and Stephens, T., (2015), 'Charting the Future of the Law of the Sea', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 888-912, Oxford University Press (Oxford), at p. 904.

demonstrates just how vividly much of society still perceive their entitlement to self-government and self-advancement under the veil of national sovereignty, even after the production of collective gains between "politically friendly" nations.[205]

(c) Sovereign Territoriality

Territorial sovereignty – the idea of segregated "zones" upon ocean space – is another symptom of Westphalianism which has already been recognised as a key regulatory weakness in ocean governance.[206] It is also possible, as with the other two characteristics of sovereignty, to see territoriality as overlapping and interlinked with the other traits. For example, through sovereign equality, all states demand reciprocal rights to any claimed resources in the ocean, which ultimately leads to a global allocation of resource zones. Similarly, through sovereign absolutism, there is a necessary presumption that at least one state must be positioned to assume regulatory jurisdiction over each subject matter, with the result that all states have carved up the entirety of the ocean in pursuit of a fair allocation of juridical responsibility for every factual circumstance. While this zonal approach has grown predominantly by creeping unilateral claims to offshore resources, it has also been viewed as a strategic opportunity to propertise the ocean bed, with the hope that coastal states will internalise environmental degradation and so guard "their" environmental assets in offshore regions.[207] However, this strategy ultimately failed given that states could now focus on exploiting their newly acquired resources in these distant offshore spaces, while simply treating the protection of the environment "out there" as an externality.[208]

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[205] Fabbrini, F. (Ed.), (2017), *The Law and Politics of Brexit*, Oxford University Press (Oxford); Martill, B. and Staiger, U. (Eds.), (2018), *Brexit and Beyond: Rethinking the Futures of Europe*, UCL Press (London).

[206] Tanaka, Y., (2008), *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management of the Laws of the Sea*, Routledge (Abingdon), at pp. 1-2. On the links between Westphalianism, territoriality and zonality, see: e.g., Brown, W., (2010), *Walled States, Waning Sovereignty*, MIT Press (Cambridge, MA); Branch, J., (2013), *The Cartographic State: Maps, Territory, and the Origins of Sovereignty*, Cambridge University Press (Cambridge); Longo, M., (2017), 'From Sovereignty to Imperium: Borders, Frontiers and the Specter of Neo-Imperialism', 22(4) *Geopolitics* 757-771; Hassan, D., (2006), 'The Rise of the Territorial State and the Treaty of Westphalia', 9 *Yearbook of New Zealand Jurisprudence* 62-70; Hassan, D., (2015), 'Territorial Sovereignty and State Responsibility - An Environmental Perspective', 45(3-4) *Environmental Policy and Law* 139-145; Orakhelashvili, A., (2015), 'State Jurisdiction in International Law: Complexities of a Basic Concept', in *Research Handbook on Jurisdiction and Immunities in International Law*, A. Orakhelashvili (Ed.), 1-49, Edward Elgar (Cheltenham); c.f., Agnew, J., (1994), 'The Territorial Trap: The Geographical Assumptions of International Relations Theory', 1(1) *Review of International Political Economy* 53-80.

[207] Supra n. 118, Barrett, at p. 70.

[208] Supra n. 119, Barnes, at pp. 236-237 and 241-242; Supra n. 121, High Seas Task Force, at p. 41; Supra n. 206, Tanaka, at p. 8.

The global patchwork of maritime zones which results from this inter-state territoriality has created hundreds of diverse regulatory systems, which are cut off and distinct from neighbouring zones.[209] The further result is that interactions between transnational actors – who move casually and fluidly across the entire ocean space – must necessarily take place through challenged "inter-national" lines,[210] also leading to shopping between enforcement agencies and regulatory systems.[211] Ocean ecosystems (including humans as a part of them) therefore witness constant regulatory gaps and overlaps, despite taking little notice practically of artificially constructed political borders.[212] Perhaps the biggest driving force behind the development of transnational law, in other fields, has been the desire to surpass the cost, complexity, unpredictability, apprehension and inefficiency associated with private international law.[213] Unless a cross-border claim is particularly strong, and carries a significant pay-off, it is rarely worth the risk and cost of pursuing.[214] This failure of law between borders is then further compounded by the near-phantom legal nature of many maritime actors, who operate within multiple-front and multiple-national companies;[215] the lack of transparency of national actors and agencies, whose efforts to produce global goods can be safely shrouded in hortatory language; and the use of a complex system of multifarious national legal systems which are randomly allocated by technocratic and idiosyncratic conflict of law rules.

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[209] See e.g., Kaye, S., (2015 'A Zonal Approach to Maritime Regulation and Enforcement', in *Routledge Handbook of Maritime Regulation and Enforcement*, R. Warner and S. Kaye (Eds.), 3-15, Routledge (Abingdon).

[210] Supra n. 149.

[211] Ibid; Supra n. 121, High Seas Task Force, at pp. 33-37; Shearer, I., (2002), 'Dissenting Opinion of Judge Ad Hoc Shearer', in *The 'Volga' Case*, Russian Federation v Australia, 23 December 2002, International Tribunal for the Law of the Sea, Case No. 11, ICGJ 344, (ITLOS Reports 2002, 66-72), at p. 72.

[212] Kirk, E.A., (1999), 'Maritime Zones and the Ecosystem Approach: A Mismatch?', 8(1) *Review of European Community & International Environmental Law* 67-72; Ekstrom, J.A., Young, O.R., Gaines, S.D., Gordon, M. and McCay, B.J., (2009), 'A Tool to Navigate Overlaps in Fragmented Ocean Governance' 33(3) *Marine Policy* 532-535; Johnston, D.M., (2006), 'The Challenge of International Governance: Institutional, Ethical and Conceptual Dilemmas', in *Towards Principled Governance: Australian and Canadian Approaches and Challenges*, D. Rothwell and D. VanderZwaag (Eds.), 349-399, Routledge (Abingdon); Cowan Jr., J.H. Rice, J.C., Walters, C.J., Hilborn, R., Essington, T.E., Day Jr., J.W. and Boswell, K.M., (2012), 'Challenges for Implementing an Ecosystem Approach to Fisheries Management, Marine and Coastal Fisheries', 4(1) *Marine and Coastal Fisheries* 496-510; Supra n. 206, Tanaka, at pp. 6-7. See Section 6.

[213] Juenger, F.K., (2000), 'The Lex Mercatoria and Private International Law', 60(4) *Louisiana Law Review* 1136-1150, at pp. 1136-1140; Supra n. 64, Stone Sweet, at pp. 630-633; Petsche, M.A., (2009), 'International Commercial Arbitration and the Transformation of the Conflict of Laws Theory', 18(3) *Michigan State University College of Law Journal of International Law* 453-494.

[214] Stylianou, P., (2008), 'Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border e-Commerce Disputes', 36(1) *Syracuse Journal of International Law & Commerce* 117-144, at pp. 123-124; Hörnle, J., (2009), 'The Jurisdictional Dilemma of the Internet', in *Law and the Internet*, 3rd Edn, L. Edwards and C. Waelde (Eds.), 121-158, Hart (Oxford), at pp. 153-154.

[215] Supra n. 148.

Furthermore, given the absolute freedom of states to self-regulate and reject foreign interference, the use of civil liability regimes – aiming to facilitate cross-border enforcement by harmonisation and reciprocation – also fail on account of their ritual rejection or wholesale dilution.[216] The outcome is that ocean stakeholders can avoid the force of private liability between overseas actors. Furthermore, as highlighted earlier, transnational stakeholders must also rely on foreign states to implement effective public and private legislation, and have no path to appeal to foreign governments for deficient regulation and enforcement.[217] The result is a significant detachment and disassociation of regulatory actors from the regulatory systems under which they find themselves; and the disassociation of those regulatory systems from the actors.

In the ocean, therefore, the cut-offs between regulatory systems propagates a 'Not-In-My-Backyard' ("NIMBY") attitude, wherein regulators naturally emphasise protection over internal interests and disregard external matters.[218] Perhaps most fundamentally of all, the artificial fragmentation of ocean space into pockets of national interest prevents an efficient integration of capacities. As such, considerable security resources, data, equipment, skills and rules needed to achieve effective ocean management and protection are habitually and inefficiently duplicated side-by-side; rather than harmonised together in effective and coordinated regional systems between all actors and agencies.[219] Thus,

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[216] Churchill, R.R., (2001), 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects', 12(1) *Yearbook of International Environmental Law* 3-41; Supra n. 93, Nollkaemper, at pp. 184-186.

[217] Supra nn. 154 and 156.

[218] Menefee, S.P., (1999), 'Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity', 5(2) *ILSA Journal of International & Comparative Law* 309-318, at pp. 315-316; Van der Aa, B. J., Groote, P. D. and Huigen, P. P., (2004), 'World Heritage as NIMBY? The Case of the Dutch Part of the Wadden Sea', 7(4-5) *Current Issues in Tourism* 291-302; Supra n. 206, Tanaka, at p. 7. See Chapter 4.

[219] Gullett, W. and Shi, Y., (2015), 'Cooperative Maritime Surveillance and Enforcement', in *Routledge Handbook of Maritime Regulation and Enforcement*, R. Warner and S. Kaye (Eds.), 378-393, Routledge (Abingdon); Lindley, J. and Techera, E. J., (2017), 'Overcoming Complexity in Illegal, Unregulated and Unreported Fishing to Achieve Effective Regulatory Pluralism', 81 *Marine Policy* 71-79; Belt, D., Chapsos, I. and Samardžić, D., (2013), 'Maritime Security Challenges in South East Europe', in *Shaping South East Europe's Security Community for the Twenty-First Century*, S. Cross, S. Kentera, R. Vukadinović and R. Nation (Eds.), 134-150, Palgrave Macmillan (London); Bueger C. and Stockbruegger, J., (2016), 'Pirates, Drugs and Navies', 161(5) *RUSI Journal* 46-52; Pinnock, F.H. and Ajagunna, I.A., (2012), 'The Caribbean Maritime Transportation Sector: Achieving Sustainability through Efficiency', *Caribbean Paper No. 13*, Centre for International Governance Innovation (Waterloo, ON); Ahmad M.Z. and Abdullah M.K., (2014), 'Chasing The Same Fish: Collaborative Management Initiative For Shared Fish Stocks Among The ASEAN Countries', in *Proceedings of the 1st International Maritime Conference (1st IMC2014) October 21, 2014*, I. Ali, L.H. Ann and D.R. Raplee (Eds.), 8-21, Universiti Malaysia Sabah (Kota Kinabalu); Ukeje, C. and Mvomo Ela, W., (2013), *African Approaches to Maritime Security*, Friedrich-Ebert-Stiftung (Abuja), at pp. 24 and 38; Mileski, J. P. and Honeycutt, J., (2013), 'Flexibility in Maritime Assets and Pooling Strategies: A Viable Response to Disaster', 40 *Marine Policy* 111-116; Agardy, T.S., (2008), 'Casting Off the Chains that Bind Us to Ineffective Ocean Management: The Way Forward', 22(1) *Ocean Yearbook* 1-17; Vogel, A., (2009), 'Navies versus Coast Guards: Defining the Roles of African Maritime Security Forces', *Africa Security Brief*, No. 2 (December 2009), Africa Center for Strategic Studies (Washington DC); Storey, I., (2009), 'Maritime Security in Southeast Asia: Two Cheers for Regional

even if states work together to achieve collective action, the underlying belief system built around exclusive sovereign "rights" and "ownership" in each maritime zone continues to undermine any sense of joint and several responsibility. This is at the heart of demands for a more integrated, regionally-coordinated and ecosystems-oriented model of ocean governance – as explored further in Chapters 6 to 9.

(d) The Fault of "Flag" States or Flag "States"?

When levelling criticisms against the failing law of the sea, the majority of international law commentators have centred their aim upon the excessive reliance on flag state jurisdiction. As a result, for many years, and more so in recent decades, authors have argued for greater prescriptive and enforcement jurisdiction from *coastal* and *port* states in order to overcome the weaknesses of distant flag state regulation.[220] This certainly does provide a number of considerable improvements on the present model, for example, by putting much greater pressure upon flag states to raise their standards in order to maintain access for their fleets to certain ports.[221] However, it is worth acknowledging that coastal and port states also suffer from the exact same symptoms of Westphalian

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Cooperation', in *Southeast Asian Affairs*, 36-58, ISEAS - Yusof Ishak Institute (Singapore); Bateman, S., (2011), 'Solving the "Wicked Problems" of Maritime Security: Are Regional Forums up to the Task?', 33(1) *Contemporary Southeast Asia* 1-28.

[220] Rayfuse, R., (2015), 'The Role of Port States', in *Routledge Handbook of Maritime Regulation and Enforcement*, R. Warner and S. Kaye (Eds.), 71-85, Routledge (Abingdon); Bautista, L., (2015), 'The Role of Coastal States', in *Routledge Handbook of Maritime Regulation and Enforcement*, R. Warner and S. Kaye (Eds.), 59-70, Routledge (Abingdon); Rayfuse, R., (2004), *Non-Flag State Enforcement in High Seas Fisheries*, Martinus Nijhoff (Leiden); König, D., (2002), 'The Enforcement of the International Law of the Sea by Coastal and Port States', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1-15; Marten, B., (2014), *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Springer (New York); Özçayır, Z.O., (2015), *Port State Control*, 2nd Edn, Routledge (Abingdon); Pamborides, G., (1999), *International Shipping Law: Legislation and Enforcement*, Brill (Leiden); Anderson, D., (2002), 'The Effect of Port State Control on Substandard Shipping', 125 *Maritime Studies* 20-25; Sage-Fuller, B., (2018), 'The Greening of Ports', in *Handbook on Marine Environment Protection: Science, Impacts and Sustainable Management*, M. Salomon and T. Markus (Eds.), 793-809, Springer (New York); Molenaar, E.J., (2015), 'Port and Coastal States', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 280-303, Oxford University Press (Oxford); Molenaar, E.J., (1998), *Coastal State Jurisdiction over Vessel-Source Pollution*, Kluwer Law International (Alphen); Molenaar, E.J., (2006), 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R.A. Barnes and D. Ong (Eds.), 192-209, Oxford University Press (Oxford); Johnson, L., (2004), Coastal State Regulation of International Shipping, Oceana TM (New York); Klein, N., (2011), *Maritime Security and the Law of the Sea*, Oxford University Press (Oxford), at pp. 318-319; Supra n. 137, Zwinge; Supra n. 136, Mansell, at pp. 219-237; Coghlin, T., (2005), 'Tightening the Screw on Substandard Shipping', 2005(3) *Lloyds Maritime and Commercial Law Quarterly* 316-326; Clarke, A., (1994), 'Port State Control or Substandard Ships: Who is to Blame? What is the Cure?', 1994(2) *Lloyds Maritime and Commercial Law Quarterly* 202-209.

[221] Vorbach, J.E., (2001), 'The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping', 32(1) *Ocean Development and International Law* 27-42; Van Leeuwen, J., (2010), *Who Greens the Waves? Changing Authority in the Environmental Governance of Shipping and Offshore Oil and Gas Production*, Wageningen Academic Publishers (Wageningen); Hare, J., 'Port State Control: Strong Medicine to Cure a Sick Industry', 26(3) *Georgia Journal of International and Comparative Law* 571-594; Supra n. 188, Jillions, at pp. 444-445.

sovereignty, such as inter-state competition, races to the bottom and the exclusive freedom to externalise global responsibility.[222] Indeed, the emphasis on *internal* interests rather than the collective interests of humankind means that public laws governing port and coastguard authorities usually emphasise criminal activities of national interest, such as inward smuggling, market distortion, and migrant trafficking, above distant environmental concerns.[223] As the Task Force on IUU Fishing on the High Seas reported, not only are domestic enforcement agencies unaware of the true global costs, but any public expenditure by any state on criminal prosecution for activities having an impact *beyond* national jurisdiction are not recouped.[224] Other practical factors also make non-flag states uncomfortable regulators, such as the physical challenges of interdiction and inspection, the difficulty with surveillance, and the pressure to avoid additional delays and disruption in port.[225]

For the very same reasons, *market* and *transit* states also make uncomfortable and highly ineffective regulators.[226] What is more, particularly on account of processing supply

[222] Petrossian, G.A., (2015), 'Preventing Illegal, Unreported and Unregulated (IUU) Fishing: A Situational Approach', 189 *Biological Conservation* 39-48; Kuemlangan, B. and Press, M., (2010), 'Preventing, Deterring and Eliminating IUU Fishing – Port State Measures', 40(6) *Environmental Policy and Law* 262-268; Swan, J., (2006), 'Port State Measures to Combat IUU Fishing: International and Regional Developments', 7(1) *Sustainable Development Law and Policy* 38-43; Petrossian, G.A., Marteache, N. and Viollaz, J., (2015), 'Where do "Undocumented" Fish Land? An Empirical Assessment of Port Characteristics for IUU Fishing', 21(3) *European Journal on Criminal Policy and Research* 337-351; Supra n. 220, König, at p. 7; Ibid, Jillions, at pp. 445-446.

[223] Supra n. 121, High Seas Task Force, at pp. 24 and 30; Supra n. 220, König, at p. 7.

[224] Supra n. 121, High Seas Task Force, at p. 33.

[225] Supra n. 2, LOSC, Art. 226(1)(a) ('States shall not delay a foreign vessel longer than is essential for purposes of the investigations […]. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry […]; further physical inspection of the vessel may be undertaken only . . . when: (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents; (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or (iii) the vessel is not carrying valid certificates and records.'); Kiehne, G., (1996), 'Investigation, Detention and Release of Ships under the Paris Memorandum of Understanding on Port State Control: A View from Practice', 11(2) *International Journal of Marine and Coastal Law* 217-224; Plaza, F., (1994), 'Port State Control: Towards Global Standardisation', 75 *Maritime Studies* 28-34; Soons, A.H.A., (2004), 'Law Enforcement in the Ocean', 3(1) *WMU Journal of Maritime Affairs* 3-16, at p. 4; Takei refers to the use of port state measures to control illegal fishing as 'controversial' (supra n. 124, Takei, at p. 67); International Convention for the Prevention of Pollution from Ships (MARPOL), (adopted 2 November 1973 (London), in force 2 October 1983), 1340 UNTS 184, Art. 7 ('All possible efforts shall be made to avoid a ship being unduly detained or delayed [and] when a ship is unduly detained or delayed . . . it shall be entitled to compensation'); According to Sahatijan, the United States have been particularly forthcoming in bringing compensation claims for delays while in port (Sahatjian, L.C., (1999), 'Marpol—An Adequate Regime? A Questioning Look at Port and Coastal State Enforcement', 1999(1) *International Oil Spill Conference Proceedings* 715-720); Özçayır, Z.O., (2008), 'The Use Of Port State Control in Maritime Industry tnd The Application Of The Paris MOU', 14(2) *Ocean & Coastal Law Journal* 201-239; Supra n. 121, High Seas Task Force, at p. 25; Churchill, R.R., (1998), 'Legal Uncertainties in International High Seas Fisheries Management', 37(1-3) *Fisheries Research* 225-237, at p. 236.

[226] See generally, Calley, D.S., (2011), *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry*, Martinus Nijhoff (Leiden); Roheim, C.A. and Sutinen, J., (2006), 'Trade and Marketplace Measures to Promote

chain and transhipment practices, it is difficult to isolate imports which breach environmental standards.[227] They also have considerable difficulty regulating resulting grey or black markets and are at constant risk of falling foul of trade protectionism rules.[228] *Home* states, who have jurisdiction over their own nationals when visiting home, are also too distanced from the specific activities and are unsuitable prosecutorial enforcers or receptors of incriminating evidence.[229] Indeed, in recent unverified reports of looting from the Battle of Jutland wrecks by converted trawlers in the North Sea, it appears that numerous port, coastal and flag states are implicated, but none have shown a willingness to fully invest in the security of wrecks more strongly valued by Britain and Germany.[230] Even in their position as a home state, the British authorities do not appear to have prosecuted a UK national reported to have been involved in the illicit activities.[231]

Critically, therefore, none of these states – whether flag, port, coastal, market, transit, or national – can avoid the same weaknesses of national sovereignty. They can commonly refuse consent to any international law which does not provide them, and only them, with a political gain on balance. They thus demand considerable incentivisation to invest financial and political resource in the sanctioning of their own citizens or in restricting

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Sustainable Fishing Practices', *ICTSD Natural Resources, International Trade and Sustainable Development Series*, Issue Paper No. 3, International Centre for Trade and Sustainable Development and the High Seas Task Force (Geneva); Supra n. 222, Swan.

[227] Ganapathiraju, P., Nakamurab, K., Pitchera, T.J., Delagranc, L., (2014), 'Estimates of Illegal and Unreported Fish in Seafood Imports to the USA', 48 *Marine Policy* 102-113; Supra n. 148, Telesetsky; Supra n. 22, Sumaila, Bellmann and Tipping, at p. 174; Roheim Wessells, C., Cochrane, K.L., Deere, C., Wallis, P. and Willmann, R., (2001), 'Product Certification and Ecolabelling for Fisheries Sustainability', *FAO Fisheries Technical Paper*, No. 422, Food and Agricultural Organization (Rome), at pp. 55-57.

[228] Supra n. 226; Ibid, Roheim Wessells et al; Young, M.A., (2016), 'International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing', 69 *Marine Policy* 209-219; Hosch, G., (2016), *Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches*, International Centre for Trade and Sustainable Development (Geneva); Le Gallic, B., (2004), 'Using Trade Measure in The Fight Against IUU Fishing: Opportunities and Challenges', in *Proceedings of the Twelfth Biennial Conference of the International Institute of Fisheries Economics & Trade, July 20-30, 2004, Tokyo, Japan: What are Responsible Fisheries?*, A.L. Shriver (Ed.), International Institute of Fisheries Economics & Trade (Corvallis); Agnew, D.J., (2004), 'The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme', 24(5) *Marine Policy* 361-374; c.f., Stokke, O.F., (2009), 'Trade Measures and the Combat of IUU fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic', 33(2) *Marine Policy* 339-349; Leroy, A., Galletti, F. and Chaboud, C., (2016), 'The EU Restrictive Trade Measures Against IUU Fishing', 64 *Marine Policy* 82-90.

[229] Supra n. 121, High Seas Task Force, at pp. 34-35; c.f., Erceg, D., (2006), 'Deterring IUU Fishing Through State Control Over Nationals', 30(2) *Marine Policy* 173-179.

[230] [230] Brockman, A., (2016), 'Exclusive: Named – The Salvage Company Which Looted Jutland War Graves as MOD Fails to Act', 22 May 2016, *ThePipeLine*, (at: http://thepipeline.info/blog/2016/05/22/exclusive-named-the-salvage-company-which-looted-jutland-war-graves-as-mod-fails-to-act/; accessed 2 January 2019); McCartney, I., (2017), 'The Battle of Jutland's Heritage Under Threat: Commercial Salvage on the Shipwrecks as Observed 2000 to 2016', 103(2) *The Mariner's Mirror* 196-204.

[231] Ibid; Maritime Executive, (2016), 'Dutch Salvors Accused of Looting Warship Wreck', 22 September 2016, *Maritime Executive*, (at: https://www.maritime-executive.com/article/dutch-salvors-accused-of-looting-warship-wreck; accessed 4 January 2019).

their own economic activity in deference to external interests.[232] Furthermore, even if they did accept maximal jurisdictional responsibility, they would still stand to gain from competing in the provision of lax regulation and apathetic enforcement. Understood in this perspective, it has been the sovereign freedom of deficient flag *state* systems to profit from lax regulation, rather than the use of *flag* state systems, which is at the heart of the legal system's underlying weakness. Certainly, increased regulation across all the governance nodes would significantly notch up standards in specific areas and force flag states to join collective standards arrangements, but the underlying fault lies in the inability to coerce states, flag or otherwise, to modify their behaviour in a manner against their own interests, as well as prohibiting states from externalising global 'losses'; not in the use of flag state regulation per se. As Englender et al recently hinted, 'neither traditional means of enforcement nor a major reform of the principle of flag State jurisdiction seem to represent genuine options to tackle the problems surrounding the issue of compliance with international obligations'.[233]

4. The Weaknesses of International Law and the UNESCO Convention

Notwithstanding all of the above weaknesses of public international legal regulation, once it came to negotiations over the UNESCO Convention, the positive aspirations to affix meaningful jurisdictional rights and obligations within the original 1994 Buenos Aires Draft of the treaty were simply moulded and contorted to fit entirely within the Westphalian framework propagated by the LOSC.[234] It is thus possible to see these very same weaknesses transmuted into the Convention's framework, with its essence being a settlement reached between self-interested sovereign negotiators, with all the lowest common denominator issues, destructive ambiguities, reliance upon exclusive rights, and collectively agreed strong limits on the establishment of international liability. This has also resulted in weaknesses with compliance and implementation by exclusive sovereigns, as explored in greater detail in Chapter 4.

[232] See Chapter 4.
[233] Supra n. 137, Englender et al, p. 186.
[234] González, A.W., (2006), 'The Shades of Harmony: Some Thoughts on the Different Contexts that Coastal States Face as Regards the 2001 Underwater Cultural Heritage Convention', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 308-312, Cambridge University Press (Cambridge), at p. 308; Guérin, U. and Egger, B., (2010), 'Guaranteeing the Protection of Submerged Archaeological Sites Regardless of their Location: The UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001)', 5(2) *Journal of Maritime Archaeology* 97-103, at p. 100.

Going further than the core issue of state compliance, there are numerous other areas where the UNESCO Convention rattles apart on its Westphalian foundations. For example, beyond its tokenistic reference to the interests of NGOs and non-state actors in the Preamble, the UNESCO Convention provides no avenue for non-state actors to establish their interests or become any form of subject of global law protecting UCH.[235] Instead, the interests of the actual stakeholders who impact on UCH, or who actually value UCH, are only to be indirectly supervised through the medium of unchecked national regulation. If two transnational stakeholders need to resolve conflicting interests or develop common solutions relating to UCH protection, they have no legal rules or framework to facilitate them, other than negotiations outside of the law or by reliance on diplomatic channels between uninterested states.[236] The entire system is furthermore predicated upon a strict observance of territoriality and boundaries, with laws and rights completely transforming as you move between zones. This creates a global web of disconnected regulatory nodes which are incredibly prone to exploitation by mere movement between systems.[237] For example, while the public interest and conservation challenges facing the two wreck sites of the RMS *Titanic* and RMS *Lusitania* are largely similar, they are situated in completely divergent legal systems by total happenstance.[238] Similarly, UCH which is owned or 'linked' to other states, often falls to be regulated under the legal system of an entirely disconnected and often apathetic coastal state.[239]

UCH therefore has the very same systemic issues of being undermined by shopping between ports or flags of convenience (or non-compliance) by transnational actors, where there is no accountability for ineffective domestic legislation or for the under-provision of public expenditure in the surveillance, policing, evidence-gathering, enforcement, or punishment of defectors.[240] Indeed, as Blake has said of the UNESCO Convention in

[235] Supra n. 1, UNESCO Convention, Preamble.
[236] Dromgoole, S., (2010), 'Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage', 25(1) *International Journal of Marine and Coastal Law* 33-61, at pp. 53-54.
[237] Yeates, J.W., (2000), 'Clearing Up the Confusion: A Strict Standard of Abandonment for Sunken Public Vessels', 12(2) *University of San Francisco Maritime Law Journal* 359-388, at pp. 362-363; Gribble, J. and Forrest, C., (2006), 'Underwater Cultural Heritage at Risk: The Case of the Dodington Coins', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 313-324, Cambridge University Press (Cambridge), at p. 323.
[238] Being located in the Canadian outer continental shelf and Irish territorial waters, respectively, despite possessing little prior connection to those national legal systems (see Martin, J.B., (2018), 'Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: The *Titanic* and *Lusitania* as World Heritage Sites', 33(1) *International Journal of Marine and Coastal Law* 116-165).
[239] Maarleveld, T. J., (2012), 'The Maritime Paradox: Does International Heritage Exist?', 18(4) *International Journal of Heritage Studies* 418-431, at p. 422.
[240] Garabello, R. and Scovazzi, T., (2003), *The Protection of the Underwater Cultural Heritage: Before and after the 2001 UNESCO Convention*, Martinus Nijhoff (Leiden), at p. 7; Scovazzi, T., (2006), 'The

2015, its 'main weakness is that it can be very difficult to enforce nationality jurisdiction from a great distance while flag State jurisdiction is notoriously poorly applied.'[241] Kowalski also points to the practical challenges of interdicting vessels and enforcing UCH protection in the maritime environment.[242] It is also common to find that looting of UCH has been linked to vessels registered under a flag-of-convenience or brought to the black market through a chain of poorly supervised vessels, ports, citizens and markets.[243] In many senses, therefore, the United States – with its pro-commerce outlook on UCH management – has also operated as a port-of-convenience, lowering standards elsewhere.[244] Furthermore, upon further investigation, the very same connections can often be found between transnational organised crime and UCH looting.[245]

The Convention also demonstrates the same issues of diluted and vacuous language, providing intentionally far-ranging latitude in interpretation and permitting behaviours to continue among non-compliant and low-compliant states.[246] Examples of such grey terms lacking normative efficacy are peppered throughout the Convention. Much of this vagueness is the result of an indolent and unimaginative repetition of parts of the LOSC, even when those rules which were emulated have already been criticised for being ambiguous or ill-conceived. For example, there is a regular reference to the need to work with states possessing a 'verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.'[247] This wording has been largely adopted from Article 149 of the LOSC, despite having previously been subject to

2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at p. 291.

[241] Blake, J., (2015), *International Cultural Heritage Law*, Oxford University Press (Oxford), at p. 106; Dromgoole, S., (2003), '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 18(1) *International Journal of Marine and Coastal Law* 59-108, at p. 90.

[242] Kowalski, W., (2006), 'Poland', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 229-246, Martinus Nijhoff (Leiden), at p. 246.

[243] O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at p. 64.

[244] Temiño, I.R., (2017), 'The Odyssey Case: Press, Public Opinion and Future Policy', 46(1) *International Journal of Nautical Archaeology* 192-201, at p. 193; Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 184. See Chapter 2.

[245] Campbell, P., (2017), 'Treasure Hunting, Looting, and the Illicit Trade in Antiquities', *Shipwrecks and Submerged Worlds*, University of Southampton, FutureLearn, (at: https://www.futurelearn.com/courses/shipwrecks/0/steps/7990; accessed 4 January 2019).

[246] Supra n. 151; Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File; Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.

[247] Supra n. 1, UNESCO Convention, Arts. 6(2), 7(3), 9(5), 18(3) and 18(4). Very similar wording is also found in Arts. 11(4) and 12(6) in relation to UCH in the Area.

extensive criticism for lack of clarity.[248] Articles 3 and 10(2) both also intentionally invoke the status quo of the LOSC regime, despite the criticism it has received for failing to adequately address UCH.[249] What is more, the extension of LOSC Article 303(2) on the regulation of UCH in the contiguous zone through Article 8 of the UNESCO Convention has also been subject to subsequent critique, with questions over the precise meaning of Articles 8 and 303 when both interoperating.[250]

Issues were also raised in Chapter 2 about interpretative uncertainties surrounding Article 4 on 'commercial exploitation' of UCH; as well as an examination in Chapter 3 of the normative force of the 'duty to cooperate' throughout the Convention. While Article 2(8) on the *potential* perpetuation of sovereign immunity over sunken state vessels is perhaps the best that could be achieved in the circumstances,[251] the precise meaning and boundaries of rights and duties is also open to much debate and potential future conflict.[252] The disjunction between the costs enjoyed and benefits absorbed by states, in combination with 'liability-avoidance' permitted by sovereign equality, has very clearly been observed in the UNESCO Convention by propagating the LOSC system of excessive state rights to natural resources, but including little concomitant state responsibility for the surrounding environment under the ambiguous and practically meaningless agreement under Article 5 to use 'best practical means' to prevent incidental destruction of UCH.[253]

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[248] Oxman, B.H., (1988), 'Marine Archaeology and the International Law of the Sea', 12(3) *Columbia VLA Journal of Law and the Arts* 353-372, at p. 361; Huang, J., (2013), 'Odyssey's Treasure Ship: Salvor, Owner, or Sovereign Immunity', 44(2) *Ocean Development and International Law* 170-184, at p. 179; Supra n. 136, Strati, at pp. 871-892; Blumberg, R.C., (2005), 'International Protection of Underwater Cultural Heritage', in *Recent Developments in the Law of the Sea and China*, M.H. Nordquist, J.N. Moore and K. Fu (Eds.), 491-512, Brill (Leiden); Vadi, V., (2012), 'War, Memory, and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law', 37(2) *Tulane Maritime Law Journal* 333-378, at p. 352.

[249] See Chapter 1, Section 4.

[250] Aznar, M.J., (2013), 'The Contiguous Zone as an Archaeological Maritime Zone', 29(1) *International Journal of Marine and Coastal Law* 1-51; Scovazzi, T., (2014), 'Underwater Cultural Heritage as an International Common Good', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 215-230, Hart (Oxford), at pp. 220-221; Harris, J.R., (2001), 'The Protection of Sunken Warships as Gravesites at Sea', 7(1) *Ocean and Coastal Law Journal* 75-130, at p. 87; Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590, at p. 571.

[251] Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 423.

[252] See Chapter 3, Section 1(c).

[253] Supra n. 243, Dromgoole, at p. 372. See Chapter 2, Section 5.

Furthermore, the obsessive focus with using artificial maritime boundaries in the governance of UCH, themselves the unfortunate result of years of political wrangling and legal posturing, forms another uninspired reinvocation of the Westphalian approach.[254] This recreates the same contests built around territoriality and exclusivity.[255] As Dromgoole concedes, with a pessimistic hint about the actual influence that states have in achieving meaningful collective action, 'the negotiators recognised that attempting to regulate the multitude of activities that take place in the marine zone would be a complex and ambitious task, and one well beyond the remit of a UNESCO-sponsored treaty.'[256] In so many words, it is so difficult to compel independent sovereigns to conform with rules imposing broad obligations to protect UCH from incidental threats, that negotiating states were content to prevent the creation of any such meaningful duties.

5. Concluding Thoughts: Recurrent Gaps in the Legal System Protecting the (Historic) Marine Environment

All of the findings across Chapters 3 to 5 have suggested that a solely Westphalian framework for governing the ocean's historic environment carries an endemic recurrence of 'gaps'. First, we witness recurrent *knowledge gaps*. This relates to the lack of communication between stakeholders and regulators, meaning that local or private actor knowledge or interests have not been effectively incorporated within regulatory decision-making.[257] It also refers to the lack of informed decision-making by market actors;[258] the

[254] 'The Convention does not change maritime zones or UNCLOS, but adapts its provisions to the complex existing law of the sea' (supra n. 234, Guérin and Egger, at p. 100).
[255] Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.
[256] Supra n. 243, Dromgoole, at p. 345.
[257] Gutiérrez, A.T. and Morgan, S., (2017), 'Impediments to Fisheries Sustainability: Coordination Between Public and Private Fisheries Governance Systems', 135 *Ocean and Coastal Management* 79-92; Berkes, F., (2009), 'Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning', 90(5) *Journal of Environmental Management* 1692-1702; Hyder, K., Townhill, B., Anderson, L.G., Delany, J. and Pinnegar, J.K., (2015), 'Can Citizen Science Contribute to the Evidence-Base that Underpins Marine Policy?', 59 *Marine Policy* 112-120; Bremer, S. and Glavovic, B., (2013), 'Mobilizing Knowledge for Coastal Governance: Re-Framing the Science-Policy Interface for Integrated Coastal Management', 41(1) *Coastal Management* 39-56; Stephenson, R.L., Paul, S., Pastoors, M.A., Kraan, M., Holm, P., Wiber, M., Mackinson, S., Dankel, D.J., Brooks, K. and Benson, A., (2016), 'Integrating Fishers' Knowledge Research in Science and Management', 73(6) *ICES Journal of Marine Science* 1459-1465; Mackinson, S., Wilson, D.C., Galiay, P. and Deas, B., (2011), 'Engaging Stakeholders in Fisheries and Marine Research', 35(1) *Marine Policy* 18-24; Lordan, C., Ó Cuaig, M., Graham, N. and Rihan, D., (2011), 'The Ups and Downs of Working with Industry to Collection Fishery-Dependent Data: The Irish Experience', 68(8) *ICES Journal of Marine Science* 1670-1678; De Nooy, W., (2013), 'Communication in Natural Resource Management: Agreement Between and Disagreement Within Stakeholder Groups', 18(2) *Ecology and Society* 44-55; Thornton, T.F. and Scheer, A.M., (2012), 'Collaborative Engagement of Local and Traditional Knowledge and Science in Marine Environments: A Review', 17(3) *Ecology and Society* 8-32.
[258] Jacquet, J.L. and Pauly, D., (2008), 'Trade Secrets: Renaming and Mislabeling of Seafood', 32(3) *Marine Policy* 309-318; Miller, D., Jessel, A. and Mariani, S., (2012), 'Seafood Mislabelling: Comparisons

lack of data exchange, resource-pooling and surveillance cooperation between regulators and enforcement agencies;[259] the lack of accurate scientific data;[260] and to the need for marine stakeholders to effectively cooperate and communicate regarding each other's relative activities, resources, and interests.[261] Second, the *geographical gaps* inherent in ocean governance are widely known. Explored in detail when considering the issues with zonality, the fragmented and patchwork nature of ocean management is a familiar opprobrium. Not only does this refer to the weakness and inefficiency of completely segregated regulation,[262] but also to the fluid movement of persons, species and other objects between political borders,[263] the lack of regulatory regimes in many regions around the world,[264] and the failure of multi-level coordination and cooperation between regulatory systems.[265]

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of Two Western European Case Studies Assist in Defining Influencing Factors', 13(3) *Fish and Fisheries* 345-358; Supra n. 182, Environmental Justice Foundation, at p. 18.

[259] Supra n. 219.

[260] Supra n. 257, Mackinson et al, 'Engaging Stakeholders'; Wright, G., (2014), 'Strengthening the Role of Science in Marine Governance through Environmental Impact Assessment: A Case Study of the Marine Renewable Energy Industry', 99 *Ocean and Coastal Management* 23-30; Serdy, A., (2016), *The New Entrants Problem in International Fisheries Law*, Cambridge University Press (Cambridge); Udovyk, O. and Gilek, M., (2013), 'Coping with Uncertainties in Science-Based Advice Informing Environmental Management of the Baltic Sea', 29 *Environmental Science & Policy* 12-23.

[261] See Chapters 6 and 9; Young, O.R., Osherenko, G., Ekstrom, J.A., Crowder, L.B., Ogden, J., Wilson, J.A., Day, J.C., Douvere, D., Ehler, C.N., McLeod, K.L., Halpren, B.S. and Peach, R., (2007), 'Solving the Crisis in Ocean Governance: Place-Based Management of Marine Ecosystems, Environment', 49(4) *Science and Policy for Sustainable Development* 20-32; Berkes, F., Berkes, M.K. and Fast, H., (2007), 'Collaborative Integrated Management in Canada's North: The Role of Local and Traditional Knowledge and Community-Based Monitoring', 35(1) *Coastal Management* 143-162; Clarke, B., Stocker, L., Coffey, B., Leith, P., Harvey, N., Baldwin, C., Baxter, T., Bruekers, G., Galano, C.D., Good, M. and Haward, M., (2013), 'Enhancing the Knowledge-Governance Interface: Coasts, Climate and Collaboration', 86 *Ocean & Coastal Management* 88-99; Ban, N.C., Mills, M., Tam, J., Hicks, C.C., Klain, S., Stoeckl, N., Bottrill, M.C., Levine, J., Pressey, R.L., Satterfield, T. and Chan, K.M., (2013), 'A Social–Ecological Approach to Conservation Planning: Embedding Social Considerations', 11(4) *Frontiers in Ecology and the Environment* 194-202.

[262] See generally, supra nn. 209-219.

[263] Supra nn. 148-149; Jakobsen, I.U., (2013), 'The Adequacy of the Law of the Sea and International Environmental Law to the Marine Arctic: Integrated Ocean Management and Shipping', 22(1) *Michigan State International Law Review* 291-320, at pp. 301-302.

[264] Many areas still lack a regional seas programme akin to OSPAR and HELCOM in Northern Europe. As Warner says, 'No legally binding conventions have yet been developed for the regional arrangements in the East Asian Seas, South Asian Seas, North-West Pacific, North-East Pacific, or for the Arctic.' (Supra n. 180, Warner, at p. 761); Molenaar, E.J., (2005), 'Addressing Regulatory Gaps in High Seas Fisheries', 20(3) *International Journal of Marine and Coastal Law* 533-570; Supra n. 127, Ardron et al, at p. 101; Ban, N.C., Bax, N.J., Gjerde, K.M., Devillers, R., Dunn, D.C., Dunstan, P.K., Hobday, A.J., Maxwell, S.M., Kaplan, D.M., Pressey, R.L. and Ardron, J.A., (2014), 'Systematic Conservation Planning: A Better Recipe for Managing the High Seas for Biodiversity Conservation and Sustainable Use', 7(1) *Conservation Letters* 41-54.

[265] Cicin-Sain, B. and Knecht, R., (1998), *Integrated Coastal and Ocean Management: Concepts and Practices*, Island Press (Washington DC); Supra n. 119, Tladi, at p. 101; Warner, R., (2009), *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework*, Brill (Leiden), at p. 126; Supra n. 212, Ekstrom et al; Töpfer, K., Tubiana, L., Unger, S. and Rochette, J., (2014), 'Charting Pragmatic Courses for Global Ocean Governance', 49 *Marine Policy* 85-86, at p. 86.

Closely interrelated, but less obvious, are the prevalent regulatory, incentive, normative and compliance gaps in transnational ocean management. *Regulatory gaps* occur where legislation or regulatory processes are lagging or suffer from poor coordination. For example, there is a particular concern with divided schemes of regulation, where disconnected organisations and actors operate within regulatory siloes.[266] There is also regular criticism of the lack of coordination and regulatory cooperation between international organisations, regulators, national legislatures and enforcement agencies.[267] What is more, we witness a languid pace of regulation, especially when it is negotiated through political inter-state bargaining processes, which fail to keep pace with constantly shifting and intensifying human activities in the ocean or with new threats and opportunities.[268] *Normative gaps* also relate to deficiencies of accountability and to the widespread lack of mandatory compliance-inducing obligations, with a recurring reliance upon ambiguous language or hortatory commitments, including within unenforceable rules or industry self-regulation.[269]

Compliance gaps refers to the issue of compliance by states with their international commitments and with the poor level of implementation and enforcement by national regulators when dealing with externally valued public goods.[270] It also refers to the lack of compliance by stakeholders with national law, as they freely select between or distance

[266] Ibid, Cicin-Sain and Knecht; Supra n. 127, Ardron et al, at p. 99 and 103; Supra n. 21, Scott, at p. 464; Supra n. 180, Warner, at p. 758; Supra n. 264, Molenaar; UN General Assembly, (2006), *Report of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biodiversity Beyond Areas of National Jurisdiction*, 20 March 2006, Sixty-First Session, UN Doc. A/61/65, United Nations (New York); Supra n. 144, Guilfoyle, at p. 224.

[267] Supra nn. 219 and 265; Supra n. 18, Gjerde et al; Druel, E. and Gjerde, K.M., (2014), 'Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea', 49 *Marine Policy* 90-97, at p. 92; Supra n. 121, High Seas Task Force, at pp. 26-27; Supra n. 119, Tladi, at p. 105; Supra n. 212, Ekstrom et al.

[268] Supra n. 127, Ardron et al, at p. 101; Supra n. 18, Gjerde et al, at p. vii.

[269] Supra n. 188, Jillions, at pp. 442-446; Drankier, P., (2012), 'Marine Protected Areas in Areas Beyond National Jurisdiction', 27 *International Journal of Marine and Coastal Law* 291-350; Supra n. 257, Gutiérrez and Morgan; Vousden, D., (2015), 'Large Marine Ecosystems and Associated New Approaches to Regional, Transboundary and 'High Seas' Management', in *Research Handbook on International Marine Environmental Law*, R. Rayfuse (Ed.), 385-410, Edward Elgar (Cheltenham), at p. 392; Barnes, R.A., Freestone, D. and Ong, D.M., (2006), 'The Law of the Sea: Progress and Prospects', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R.A. Barnes and D.M. Ong (Eds.), 1-27, Oxford University Press (Oxford), at p. 17; Allott, P., (1992), 'Mare Nostrum: A New International Law of the Sea', 86(4) *American Journal of International Law* 764-787, at p. 781.

[270] See Chapter 4; Supra n. 121; Supra n. 203, Wright et al, at pp. 8-9; Ringbom, H., (2015), 'Vessel-Source Pollution', in *Research Handbook on International Marine Environmental Law*, R. Rayfuse (Ed.), 105-131, Edward Elgar (Cheltenham), at pp. 115 and 127; Supra n. 220, Molenaar, 'Port and Coastal States', at p. 292; Supra n. 120, Klein, at pp. 599 and 602; Visbeck, M., Kronfeld-Goharani, U., Neumann, B., Rickels, W., Schmidt, J., van Doorn, E., Matz-Lück, N. and Proelss, A., (2014), 'A Sustainable Development Goal for the Ocean and Coasts: Global Ocean Challenges Benefit from Regional Initiatives Supporting Globally Coordinated Solutions', 49 *Marine Policy* 87-89, at p. 88; Supra n. 267, Druel and Gjerde, at p. 91.

themselves from traditional regulatory structures.[271] Closely related to normative and compliance gaps, thus, are the *incentive gaps* which acknowledge the gap between a desired regulatory object and the incentive on the part of political actors to comply. As was explored in Chapter 4, only by enabling consensus-made law to actually reign over consent-based self-enforcement, along with the eradication of horizontalism by the building of more powerful enforcement mechanisms, can regulators be incentivised to fully invest in much-needed cooperation and to break down the harmful interoperation of Prisoner's Dilemma and free riding. The consent-based, horizontal and zonal system of public international law has thus weakened the effectiveness of ocean management for so long that now that what is needed is an entirely new approach to ocean law and governance. This new transnational and integrated approach will be explored further in Chapters 6 to 10, where a proposal is made to expand multilateral, supranational and pluralistic regulation at the global, regional, local, and transnational scales.

However, while this yearning for a new governance paradigm has been recently emerging in reference to the natural environment, there is still no research reviewing the protection of UCH from this critical perspective of the legal *system*, rather than the legal *rules*. While some writers on UCH law have noted the likely need for regional solutions,[272] as well as made routine statements about the need for better integration of non-state actors,[273] there is still a lack of detailed research committed toward understanding the benefits or the means to achieve these objectives. For example, in 2013, Risvas set out to evaluate the issues with states merely relying on a commitment to cooperate within the UNESCO Convention.[274] Although he made several important points, including the need for better regional agreements, he did not examine alternative governance structures beyond the LOSC framework and instead focused solutions upon further multilateral treatymaking or even the development of customary rules of international law.[275] This is perhaps unsurprising given that he indicates, within a contemporaneous article, his admiration for the 'much-celebrated Westphalian international legal order.'[276]

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[271] Luck, E.C., (2004), 'Gaps, Commitments, and the Compliance Challenge', in *International Law and Organization: Closing the Compliance Gap*, E.C. Luck and M.W. Doyle (Eds.), 303-330, Rowman & Littlefield (Lanham), at p. 328.
[272] See Chapter 7.
[273] See Chapter 9.
[274] Supra n. 250, Risvas.
[275] Ibid.
[276] Risvas, M., (2013), 'Multilateral and Bilateral Approaches in the Protection of Underwater Cultural Heritage', 5 (2013) *Transnational Dispute Management*, (http://www.transnational-dispute-management.com/article.asp?key=2000), at p. 3.

Perhaps the best progress in this regard was reached, in 2017, by a PhD student who published a brief article in the Berkeley Journal of International Law which at last showed some nascent awareness of the need to look beyond positive law. Although the actual focus of the paper was on a standard and legalistic review of the UNESCO Convention's application in some example contexts, it did mention some governance matters such as the growing role for transnational NGOs and the potential of regional regimes.[277] Nevertheless, a critical examination of the public international law model, and a detailed analysis of what such a post-Westphalian approach might entail, has not yet been achieved. For example, in her leading book on the international law of UCH protection, Dromgoole suggests that the Convention 'takes an internationalist, rather than nationalist, approach to the UCH resource'.[278] Similarly, in 2006, she said that 'UCH is already reaping the benefits of the modern trend towards an "holistic" approach to the marine environment.'[279] However, the findings from this study would suggest that both of these statements do not uncover the situation accurately: it could in fact be argued that the UNESCO Convention takes a characteristically nationalistic, un-holistic and politically fragmented approach to the global governance of UCH protection.

As a result, Chapters 6 to 10 now proceed to draw out a more integrated, transnational and multi-level approach which could enhance the level of protection for UCH, by making use of additional systems of protection beyond the inter-national paradigm. This carries forward the theories and concepts of transnational law, as explored in Section 2 above, and demonstrates that such an approach should be *inclusive* of other governance levels and multiple stakeholders beyond the state. In order to construct such an inclusive and integrated approach, it will propose the enhanced use of a multi-level governance frame to understand transnational polity networks arranged across the global, regional, national and community levels. It is these chapters which move beyond a *critique* of the current framework and explore, particularly through the empirical evidence obtained during this study, the possible solutions to overcoming our dogmatic reliance on national absolutism, equality and territoriality.

[277] Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261.
[278] Supra n. 243, Dromgoole, at pp. 371-372.
[279] Dromgoole, S., (2006), 'Editor's Introduction', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), xxvii-xxxviii, Martinus Nijhoff (Leiden), at p. xxxvii.

Chapter 6

A Global Governance Approach to the Protection of Underwater Cultural Heritage

Chapter Abstract:

Having explored the many weaknesses with the present system of international law in protecting underwater cultural heritage (UCH) – including issues of international cooperation, vague and abstruse rules, under-compliance, collective action weaknesses over global public good production, and pervasive fragmentation and discord – the following chapter now introduces the potential solution of 'multi-level governance' explored through Chapters 6 to 10, i.e., governance which encourages the vertical allocation of transnational regulation across the global-regional-national-community levels. The chapter first explores the relationship between 'integrated ocean management', 'multi-level governance' and 'global governance' with the search for solutions to fragmentation and gaps present within ocean governance models. It then examines the first 'level' in a multi-level governance framework, by assessing whether the provision of detailed normative co-regulatory regimes and the empowerment and enhanced role of non-state actors and hybrids at the 'global' level could enhance the protection of UCH beyond the strictly national-level paradigm. The chapters that follow then explore the regional-level (Chapter 7), national-level (Chapter 8) and local community-level (Chapter 9) respectively.

1. Integrated, Transnational and Multi-Level Perspectives of Governance

(a) Post-Westphalian Perspectives of Global Underwater Cultural Heritage Protection

Having highlighted the numerous weaknesses of the public international law system in Chapters 3 to 5, as enforced through the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention)[1] and the UN 1982 Convention of the Law of the Sea (LOSC),[2] Chapters 6 to 9 now evaluate whether a multi-level governance approach – recognising law beyond the state at different governance 'levels', i.e., global, regional, and community levels – could provide additional protections and

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.
[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.

norms which drive forward the quality of the international system protecting UCH. In effect, as this section proceeds to demonstrate, one can understand the multi-level approach as effectively taking the 'transnational' approach, as introduced in Chapter 5, as well as an 'integrated' approach, as increasingly called for in marine governance circles. It demonstrates that, given UCH's characterisation as a prototypically transnational concern in a transnational context, it is better suited to a form of global protection which has further expanded 'vertically', up and down the governance scales; as opposed to restricting governance to the 'horizontal' level, purely between sovereign nations.

The following chapters therefore evaluate the possibility of taking a more transnational governance approach to protecting UCH by examining each of these governance 'levels' in turn, looking at the global level (Chapter 6), regional level (Chapter 7), national level (Chapter 8), and community level (Chapter 9). In each case, the chapters will introduce some theories and previous empirical studies which demonstrate the efficacy of governance being utilised at each level, before then proceeding to incorporate and assess these theories in the context of UCH protection, relying on this study's own empirical findings, interviews and literature study. Each of the chapters provide evidence that the global protection of UCH could be advanced further by moving beyond a strictly 'nationalist' paradigm and recognising that communities, organisations, rules, and systems – operating at the global, regional and local spatial scales – could all provide a valuable form of additional protection.

It is shown that such approaches could help ameliorate many of the issues identified throughout Chapters 3 to 5 relating to poor international compliance, consent-based law, and collective action failure in the production of goods with positive externalities. In looking at the national level, Chapter 8 also naturally explores how the traditional frame of national and international law, as critiqued in these earlier chapters, will continue to be essential in an effective multi-level framework. Instead, it is argued, the national level should now interact in a complementary and harmonious duality with 'law beyond the state'. As Firth said in interview, 'I think the idea of having a multiple-layered approach is a good one.'[3] Referring to his own thesis chapter on 'Nationalism and Post-Nationalism', in his book on *Managing Archaeology Underwater*, he explains how his own research had discovered how 'you can actually anticipate different models of

[3] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File.

managing marine archaeology which are not so reliant on the nation state', including at the subnational and at the European level.[4]

The chapter which follows first argues that there is an uncoincidental link between calls to take a more "integrated" approach to managing the marine environment with the theories and concepts of transnational law, which was introduced in Chapter 5. Following this, Section 2 goes on to examine some of the rules and actors which could enhance the protection of UCH at a 'global' level. This sets the scene for Chapter 7, which undertakes an important assessment of some key advantages of adopting further regulation at the 'regional' level.

(b) Widespread Calls for a New "Integrated" Approach to Governing the Marine Environment

The weaknesses of the ocean's legal *system* rather than its legal *rules*, as highlighted across Chapters 3 to 5, has increasingly become a central focus of the international community. For example, throughout detailed studies between 2010 and 2015 by the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction ('BBNJ Working Group'), concern was continually expressed at the inevitably poor implementation or the likely dilution of any resulting commitments between states, rather than the content of any agreed rules.[5] As a result, the BBNJ Working Group urged the need for better cooperation and coordination between 'all sectors and all levels', conceding that 'a global universal governance structure remained the best way to promote sustainable marine biodiversity beyond areas of national jurisdiction.'[6]

This pessimistic allusion to the present system of law – highlighting concern for compliance, implementation and enforcement of international agreements, or with

[4] Supra n. 3, Firth; Firth, A., (2002), *Managing Archaeology Underwater: A Theoretical, Historical and Comparative Perspective on Society and its Submerged Past*, BAR Publishing (Oxford), at pp. 79-100.
[5] E.g., UN General Assembly, (2008), *Letter dated 15 May 2008 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction addressed to the President of the General Assembly*, 16 May 2008, Sixty-Third Session, UN Doc. A/63/79, at para. 47; UN General Assembly, (2015*), Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, 13 February 2015, Sixty-Ninth Session, UN Doc. A/69/780, at para. 13.
[6] Ibid, 2015 Letter from Working Group to UNGA President, at para. 12.

pervasive regulatory, normative or geographical gaps – has also become increasingly visible in leading academic commentary. For example, Vousden stated in 2015 that 'many leading experts on high seas and ocean governance are now convinced that . . . there is now an urgent need for a transformation to a more suitable legal regime which is more cross-sectoral and integrated in its management approaches and strategies.'[7] In the same year, Warner also said that international discussions 'have demonstrated that a more integrated legal and institutional structure rather than the current patchwork of hard and soft law provisions and disparate institutions is needed'.[8] In 2013, Freestone said that 'virtually all are in agreement . . . that we need far more effective means of enforcing compliance with the norms and structures that we have.'[9] In 2015, Guilfoyle highlighted that 'the problem is usually less with the substantive law than with State capacity to implement it'.[10] In 2015, Scott wrote that among 'all levels of oceans governance – national, regional, and global – it is now recognized that fragmented and sector-based management "is a major contributor to deteriorating ocean health".'[11]

Similarly, in 1999, a former Secretary-General of the IMO said that the organisation had concluded that it did 'not need more treaties and more regulations[, but instead that] focus should be placed on achieving uniform implementation of IMO global standards that are already on the books'.[12] In 2012, Jillions wrote that 'the real gap is not in the enforcement regime of UNCLOS, but . . . in the wider constitutional enforcement regime for the most

[7] Vousden, D., (2015), 'Large Marine Ecosystems and Associated New Approaches to Regional, Transboundary and 'High Seas' Management', in *Research Handbook on International Marine Environmental Law*, R. Rayfuse (Ed.), 385-410, Edward Elgar (Cheltenham), at p. 390; Rayfuse, R. and Warner, R., (2008), 'Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century', 23(3) *International Journal of Marine and Coastal Law* 399-422.

[8] Warner, R.M., (2015), 'Conserving Marine Biodiversity in Areas Beyond National Jurisdiction Co-Evolution and Interaction with the Law of the Sea', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 752-776, Oxford University Press (Oxford), at p. 775.

[9] Freestone, D., (2013), 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas', in *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, D. Freestone (Ed.), 1-8, Martinus Nijhoff (Leiden), at p. 8.

[10] Guilfoyle, D., (2015), 'The High Seas', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 203-225, Oxford University Press (Oxford), at p. 224.

[11] Scott, K.N., (2015), 'Integrated Oceans Management: A New Frontier in Marine Environmental Protection', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 463-490, Oxford University Press (Oxford), at pp. 488-489 (internal quote: Ekstrom, J. A., Young, O. R., Gaines, S. D., Gordon, M. and McCay, B. J., (2009), 'A Tool to Navigate Overlaps in Fragmented Ocean Governance' 33(3) *Marine Policy* 532-535, at p. 532).

[12] O'Neil, W., (1999), 'Welcoming Remarks', in *Current Maritime Issues and the International Maritime Organization*, M.H. Nordquist and J.N. Moore (Eds.), 3-6, Martinus Nijhoff (Leiden), at p. 4.

important . . . rules of international law.'[13] In 2014, Visbeck et al suggested that ocean governance has failed 'due to the basic structures set out under international law.'[14] In 2015, Kirk concisely expressed that the 'need for a holistic approach to ocean governance has gained widespread acceptance and warrants little debate.'[15] Similarly, Altvater said during interview that 'we simply should implement what we have and we don't do it, we are too lax on that, we're not really strict.'[16] In other words, it is not necessarily the posited law contained in inter-state treaties which needs reform, but the ocean's legal system itself.

In response to these systemic gaps within the present system of international law, as were explored in detail throughout Chapters 3 to 5, there are widespread calls for an approach built around greater 'integration' or for 'Integrated Ocean Management' (IOM).[17] For example, Agenda 21, which was adopted at the famed 1992 UN Rio Conference on Environment and Development, declared in its Chapter 17 that the ocean 'forms an integrated whole' and requires new regulatory approaches which are 'integrated in content'.[18] Similarly, in 2001, a UN General Assembly Resolution also regarded '[c]apacity-building, regional cooperation and coordination, and integrated ocean management, as important cross-cutting issues to ocean affairs.'[19] In 2002, the UN Open-Ended Informal Consultative Process declared that an 'integrated, interdisciplinary, interzonal and ecosystem-based approach to oceans management . . . is not just desirable, it is essential.'[20] The need to take an integrated, multidisciplinary, and multi-sectoral

[13] Jillions, A., (2012), 'Commanding the Commons: Constitutional Enforcement and the Law of the Sea', 1(3) *Global Constitutionalism* 429-454, at p. 21.
[14] Visbeck, M., Kronfeld-Goharani, U., Neumann, B., Rickels, W., Schmidt, J., van Doorn, E., Matz-Lück, N. and Proelss, A., (2014), 'A Sustainable Development Goal for the Ocean and Coasts: Global Ocean Challenges Benefit from Regional Initiatives Supporting Globally Coordinated Solutions', 49 *Marine Policy* 87-89, at p. 87.
[15] Kirk, E.A., (2015), 'The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance', 46(1) *Ocean Development & International Law* 33-49, at p. 33.
[16] Altvater, S., (2018), Interview with Susanne Altvater, 17 May 2018, Transcript on File.
[17] Although various different phrases have been used over the years, often with different emphases, the term "Integrated Ocean Management" has become quite widely adopted (e.g., Jakobsen, I.U., (2013), 'The Adequacy of the Law of the Sea and International Environmental Law to the Marine Arctic: Integrated Ocean Management and Shipping', 22(1) *Michigan State International Law Review* 291-320, at pp. 297-298).
[18] UN General Assembly, (1992), *Agenda 21: Programme of Action for Sustainable Development*, Forty-Sixth Session, 12 August 1992, UN Doc. A/Conf.151/26; Naeve, H. and Garcia, S.M., (1995), 'The United Nations System Responds to Agenda 21.17: Oceans', 29(1-3) *Ocean and Coastal Management* 23-33.
[19] UN General Assembly, (2001), *Resolution Adopted by the UN General Assembly: 56/12. Oceans and the law of the sea*, 13 December 2001, Fifty-Sixth Session, UN Doc. A/RES/56/12, at para 48.
[20] UN General Assembly, (2002), *Report on the work of the United Nations Open-ended Informal Consultative Process established by the General Assembly in its resolution 54/33 in order to facilitate the annual review by the Assembly of developments in ocean affairs at its third meeting – Letter dated 20 May 2002 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly*, 2 July 2002, Fifty-Seventh Session, UN Doc. A/57/80, at para.4.

approach to ocean management was further confirmed again at the 2002 World Summit on Sustainable Development and, in 2012, at the Rio + 20 UN Conference on Sustainable Development.[21] Another UN General Assembly Resolution in 2005 also declared that 'the problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach', stressing 'the need to improve cooperation and coordination at national, regional and global levels [and] promoting the implementation [of] integrated ocean management'.[22]

It is not just global institutions and accords relaying this message, but academics have also been consonant. For example, in 2008, Tanaka wrote how 'international documents tend to stress the importance of a holistic approach by referring to . . . "integrated ocean management".'[23] In 2012, Barnes told us that 'integration is an essential feature of the law of the sea.'[24] In 2014, Druel and Gjerde said protection of the marine environment should be 'effectively dealt with in an integrated manner across an interconnected ocean.'[25] In 2015, Scott said IOM had 'been widely endorsed – in theory if not in practice – at national, regional, and global levels.'[26] Then in 2016, just as unequivocally, Wright et al said that '[m]any States, scientific experts and civil society groups have . . . repeatedly highlighted the need for integrated ocean governance.'[27]

Yet, despite its central placement on the global agenda, the precise meaning, content and envisioned structure of this new *integrated* approach to ocean management remains remarkably underexamined.[28] Under the pressures of globalisation, it appears that IOM

[21] United Nations, (2002), *Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August – 4 September 2002*, UN Doc. A/CONF.199/20, at para. 30; United Nations, (2012), *Report of the United Nations Conference on Sustainable Development Rio de Janeiro, Brazil 20-22 June 2012*, UN Doc. A/CONF.216/16, at paras. 158 and 161.
[22] UN General Assembly, (2006), *Resolution adopted by the General Assembly on 29 November 2005: 60/30. Oceans and the law of the sea*, 8 March 2006, Sixtieth-Session, UN Doc. A/RES/60/30, at Preamble.
[23] Tanaka, Y., (2008), *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management of the Laws of the Sea*, Routledge (Abingdon), at p. 16.
[24] Barnes, R., (2012), 'The Law of the Sea Convention and the Integrated Regulation of the Oceans', 27(4) *International Journal of Marine and Coastal Law* 859-866, at p. 859 (emphasis added).
[25] Druel, E. and Gjerde, K.M., (2014), 'Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea', 49 *Marine Policy* 90-97, at p. 91.
[26] Supra n. 11, Scott, at p. 464.
[27] Wright, G., Rochette, J., Blom, L., Currie, D., Durussel, C., Gjerde, K. and Unger, S., (2016), *High Seas Fisheries: What Role for a New International Binding Instrument?*, Study No. 3/2016, IDDRI (Paris), (at: https://www.iddri.org/sites/default/files/import/publications/st0316_gw-et-al._fisheries-bbnj.pdf; accessed: 4 January 2019), at p. 9.
[28] '[T]he concept . . . remains obscure in international law. Indeed, it appears that international instruments tend to use the term loosely.' (Supra n. 23, Tanaka, at p. 17); 'Despite the endorsement and, in many cases, adoption and application of IOM by national, regional, and global institutions a definitive definition of the concept remains elusive.' (Supra n. 11, Scott, at p. 466); 'There are many different formulations and

is primarily focused on the holistic management of the ocean as one large interdependent and truly transnational ecosystem.[29] By understanding the placement of humans as an integral aspect of this interconnected ocean network, many writers liken IOM to an 'ecosystems-based approach'; which would, in essence, require all decision-making and management to derive from a highly relational (interdependent) and cumulative understanding of marine activities upon the long-term interests of all stakeholders.[30]

Some go so far as to view IOM and ecosystems-based management as interchangeable terms.[31] By contrast, Oanta viewed IOM as necessitating end-to-end regulation which improves cohesion and harmony across the regulatory framework.[32] Most also concur that IOM's meaning is rarely fixed but is, in fact, highly context-dependent.[33] It is therefore perhaps best characterised as a growing collection of *principles* and *processes* which can be called upon depending on the specific context, challenges and circumstances in focus.[34] Scott, for example, draws upon various environmental principles and marine planning processes being used in various regions and nations across the world.[35] Similarly, Kirk argues that an approach is needed which 'combines both principle and process', although she only really draws upon a narrow set of environmental principles which merely comprise an ecosystems-based approach.[36]

Yet, a brief review across the literature field would suggest that IOM perhaps contains a number of general environmental *principles*, such as sustainable development, intergenerational and intragenerational equity, ecosystem services, common but differentiated responsibilities, access and benefit sharing, precautionary management, and the polluter pays principle. As well as other more general principles such as public

definitions and many denominations applied in different instruments and documents' (supra n. 17, Jakobsen, at p. 297).

[29] E.g., Barnes, R.A., Freestone, D. and Ong, D.M., (2006), 'The Law of the Sea: Progress and Prospects', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R.A. Barnes and D.M. Ong (Eds.), 1-27, Oxford University Press (Oxford), at p. 3; UN General Assembly, (2006), *Oceans and the law of the sea: Report of the Secretary-General*, 9 March 2006, Sixty-First Session, UN Doc. A/61/63, at para. 136.

[30] Supra n. 17, Jakobsen, at pp. 293-296; Supra n. 15, Kirk; Jay, S., (2012), 'Marine Space: Manoeuvring Towards a Relational Understanding',14(1) *Journal of Environmental Policy & Planning* 81-96; Supra n. 11, Scott, at p. 465; Supra n. 23, Tanaka, at p. 18.

[31] Torrie, M., (2016), *Integrated Ocean Management - Fisheries, Oil, Gas, and Seabed Mining*, FAO Globefish Research Programme, Vol. 122, United Nations Food and Agricultural Organization (Rome), (at: http://www.fao.org/3/a-i6048e.pdf; accessed 2 January 2019), at p. 1.

[32] Oanta, G.A. (2014), 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda', 16 *International Community Law Review* 214-235, at p. 226.

[33] Supra n. 11, Scott, at pp. 466-467.

[34] Supra n. 11, Scott; Supra n. 15, Kirk.

[35] Supra n. 11, Scott.

[36] Supra n. 15, Kirk.

participation, transparency, and accountability. In addition to these principles, numerous governance *processes* can be utilised in order to achieve better integration, such as marine spatial planning, marine protected areas, environmental impact assessments, integrated coastal zone management, co-management, and various collaborative models of governance.

Finally, many authors also understand IOM as serving to bridge the specific 'gaps' in ocean governance, which arise under the LOSC framework. Barnes's approach, for example, classified IOM as providing normative, spatial, sectoral, temporal, disciplinary and user integration.[37] Similarly, the BBNJ Working Group viewed IOM as bridging regulation, implementation, governance, coordination and information sharing gaps.[38] Further, although Tanaka broke IOM down into ecological, normative and implementation integration vectors, it can be seen that his definition of these was narrowly focused upon institutional or agency coordination and, thus, largely excluded the various gaps arising when looking more closely at the vital stakeholder level.[39]

In other words, at the heart of all of these theories, as well as the numerous principles and processes highlighted, is a consistent theme of *stakeholder inclusivity*, with a concomitant search for adaptive and efficient systems of *multi-level regime-building* – across global, regional, national, and local levels – to coordinate this expanded corpus of non-state actors and transnational institutions. This account of IOM accords, for example, with Elisabeth Mann Borgese's renowned 1998 visionary monograph, 'The Oceanic Circle: Governing the Seas as a Global Resource', which promoted a new approach to ocean governance in the light of failures under the international sovereignty model.[40] Both Borgese and Arvid Pardo now perhaps deserve greater posthumous recognition for both of their clairvoyant appeals for a more equitable and community-centred approach, necessitating the inclusion of all humankind at the centre of ocean management and focusing maritime sovereignty under a functional lens.[41] The same recognition could

[37] Supra n. 24, Barnes, at pp. 860-862.
[38] UN General Assembly, (2012), *Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, 13 June 2012, Sixty-Seventh Session, UN Doc. A/67/95, at paras. 34 and 42.
[39] Supra n. 23, Tanaka, at pp. 18-21.
[40] Borgese, E.M., (1998), *The Oceanic Circle: Governing the Seas as a Global Resource*, United Nations University Press (New York).
[41] E.g., Ibid; Pardo, A., (1983), 'An Opportunity Lost', in *Law of the Sea: U.S. Policy Dilemma*, B.H. Oxman, D.C. Caron and C.L.O. Buderi (Eds.), 13-26, ICS Press (San Francisco); Pardo, A., (1984), 'The Law of the Sea: Its Past and Its Future', 63(1) *Oregon Law Review* 7-17; Pardo, A. and Borgese, E.M.,

perhaps also be attributed to Allott's thesis on the Mare Nostrum ('Our Sea') in 1992, which similarly attempted to make a case for a human-centred and post-Westphalian approach to ocean governance.[42] As Barnes, Freestone and Ong said in 2006, perhaps with some hope, there has been a 'decline in [the] vigour' of positivism in the international law of the sea today, which has begun seeking 'the existence of an international community rather than a society of independent States'.[43]

(c) "Integrated" Ocean Governance as Another Word for "Transnational" Governance

The present system of international law – built around horizontal state bargaining, reactive consent-based mechanisms and reliance on enforcement by domestic agencies – has been shown in Chapters 3 to 5 to be one of the key culprits for the law of the sea's deficiency, inefficiency, zero-sum competition effects, and propensity for races to the bottom.[44] While commentators have perhaps occasionally noted the transnational nature of the oceans,[45] where solutions are needed which provide for regulatory consistency and which capture transnational activity from end-to-end,[46] there has been a noticeable dearth of literature in the law of the sea field making the link between *transnational law*, as a broad discipline and field of study (as introduced in Chapter 5) with the coveted principles and processes of *IOM*, as highlighted above.[47] Given that the same weaknesses of the international law of the sea which are universally lamented are nearly identical to those that the transnational legal discipline seeks to address – in particular emphasising the expanded role of supranational and non-state systems and actors operating more fluidly at transnational scales – this is both surprising and regretful. This is more so given that, in its normative guise, transnational law seeks to achieve a multiple-level, holistic and inclusive system of law in response to global regulatory challenges. As such, any

(1975), *The New International Economic Order and the Law of the Sea: A Projection*, International Ocean Institute (Malta).

[42] Allott, P., (1992), 'Mare Nostrum: A New International Law of the Sea', 86(4) *American Journal of International Law* 764-787

[43] Supra n. 29, Barnes, Freestone and Ong, at p. 13.

[44] See Chapters 3 to 5. Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at p. 168.

[45] E.g., Cartner, J.A.C., Fiske, R. and Leiter, T., (2009), *The International Law of the Shipmaster*, Routledge (Abingdon), at pp. 24-25 ('The shipmaster works mostly under *transnational* maritime law.' (Emphasis added)).

[46] Supra n. 32, Oanta, at pp. 221 and 226; Le Gallic, B., (2008), 'The Use of Trade Measures Against Illicit Fishing: Economic and Legal Considerations', 64(4) *Ecological Economics* 858-866, at p. 858; High Seas Task Force, "net to supermarket".

[47] For example, in January 2019, a Google search by the author for "transnational law of the sea" returns zero results; whereas "transnational human rights" returns 74,500 results, "transnational environmental law" returns 37,400 results, "transnational criminal law" returns 178,000 results, and even "transnational family law" returns 3,400 results.

proposed model of IOM should, by necessity, incorporate the theories, processes and approaches of transnational law and governance.

In all cases, as noted, one can find that *stakeholder participation* – and the capacity of ocean users at all levels both within and without the state to effectively and productively communicate, cooperate, coordinate, and collaborate – as is at the heart of the IOM approach. For example, even under those headings which are discernibly regulatory in focus, such as the need for normative frameworks which cross political boundaries, the underlying rationale is addressing the conflicting and overlapping interests of multi-level communities, which are presently inadequately served by a fragmented zonal system.[48] Barnes therefore rightly summarises that a 'truly integrated approach' would empower stakeholders to be engaged in the regulation process.[49] However, he also rightly conceded that, while the LOSC recognises the importance of stakeholder inclusion, its state-to-state focus means that 'it lacks the institutional capacity to accommodate a wider range of participants and to structure their input into the management of ocean space.'[50]

(d) Transnational Governance as Multi-Level Governance

It is possible to detect the same common theme throughout all social scientific research fields which seek to improve upon the presently beleaguered model of Westphalian law, being that of considerably enhanced stakeholder participation throughout the wider governance structure.[51] Research and theories aimed at increasing public participation have therefore proliferated in recent years, with the principle of civil society inclusivity being seen by some as a revolutionary movement.[52] Environmental public participation

[48] See Chapters 5 and 9.
[49] Supra n. 24, Barnes, at p. 862.
[50] Supra n. 24, Barnes, at p. 862.
[51] Macdonald, T., (2008), Global Stakeholder Democracy: Power and Representation Beyond Liberal States, Oxford University Press (Oxford); Commission on Global Governance, (1995), *Our Global Neighbourhood: The Report of the Commission on Global Governance*, Oxford University Press (Oxford); Commission on Global Governance, (1999), *The Millennium Year and the Reform Process*, Commission on Global Governance (London); Boutros-Ghali, B. and United Nations (1996), *An Agenda for Democratization*, United Nations (New York); Ebbesson, J., (2008), 'Public Participation', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 681-703, Oxford University Press (Oxford); Coenen, F., Huitema, D. and O'Toole, L. (Eds.), (1998), *Participation and the Quality of Environmental Decision Making*, Springer (New York); Gemmill, B. and Bamidele-Izu, A., (2002), 'The Role of NGOs and Civil Society in Global Environmental Governance', in *Global Environmental Governance: Options and Opportunities*, D.C. Esty and M.H. Ivanova, 77-100, Yale School of Forestry & Environmental Studies (New Haven).
[52] Raustiala, K., (1997), 'The 'Participatory Revolution' in International Environmental Law', 21(2) *Harvard Environmental Law Review* 537-586; Woodward, B.K., (2010), *Global Civil Society in International Lawmaking and Global Governance*, Martinus Nijhoff (Leiden); Ebbesson, J., (1997), 'The Notion of Public Participation in International Environmental Law', 8 *Yearbook of International Environmental Law* 51-97; Sand once described the 1992 Rio Conference as a 'participatory revolution',

can range from small-scale local resource management, right up to the representation of global communities and interest groups at international fora.[53] It can also come in many forms, from a simple requirement to improve public information and transparency of decisionmakers, to consultations of affected individuals and communities in the development of new legislation, up to full-scale regulatory management of public goods by private actors.[54] There are also many representative forms of the global demos, such as non-governmental organisations (NGOs), including charities, advocacy networks and interest groups all operating at the national, regional and global levels; corporations and other enterprises, also operating at or across the local, national, regional and global scales; epistemic (or 'expert') communities and standards bodies, across all levels; as well as all communities and individual humans themselves.[55]

As a result, it has also become apparent that multi-level governance (MLG), i.e., governance which is understood as interlinking and overlapping regimes at different spatial 'levels' or scales – global, regional, national, and community – should provide both the descriptive and normative frame in which to understand the coveted stakeholder-inclusive model. Not only does MLG provide an appealing vision for a simple response to the complex challenge of transnational governance and provide substance to the idea of multi-stakeholderisation, but also helps clarify the role and function of the state and the role of non-state actors in the governance framework.[56] In fact, a multi-stakeholder approach naturally calls for a multi-level approach given that most actors 'beyond the

where having 'more than 1,400 non-governmental organizations registered as observers and 8,000 at the parallel Global Forum . . . prepared the ground not only for subsequent reforms in UN accreditation rules . . . but also for the public-private partnerships eventually formalized at the 2002 Johannesburg World Summit on Sustainable Development.' (Sand, P.H., (2008), 'The Evolution of International Environmental Law', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 29-43, Oxford University Press (Oxford), at pp. 40-41); 'The literature on participation in environmental decision-making is vast, crossing various disciplines' (Pieraccini, M., (2015), 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England', 27(1) *Journal of Environmental Law* 45-67, at p. 47).

[53] Aloni, C., Daminabo, I., Alexander, B.C. and Bakpo, M.T., (2015), 'The Importance of Stakeholders Involvement in Environmental Impact Assessment', 5(5) *Resources and Environment* 146-151, at pp. 148-149; UNDP, (2016), *Promoting Sustainable Development Through More Effective Civil Society Participation in Environmental Governance: A Selection of Country Case Studies from the EU-NGOs Project*, United Nations Development Programme (New York), at p. 8.

[54] Supra nn. 51-53; For example, Bederman helpfully distinguishes between two types of stakeholder participation, being direct democracy and participation based on 'delegatory paradigms (based on principal-agent theories and the practices of representative republics)' (supra n. 44, Bederman, at p. 172).

[55] Bodansky, D., Brunnée J. and Hey, E., (2008), 'International Environmental Law: Mapping the Field', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 1-28, Oxford University Press (Oxford), at pp. 16-17.

[56] Supra n. 51, Macdonald, at pp. 32-34; Connelly, C., (2012), *Multi-Stakeholder Decision-Making: A Guidebook for Establishing a Multi-Stakeholder Decision-Making Process to Support Green, Low-Emission and Climate-Resilient Development Strategies*, United Nations Development Programme (New York), at p. 3.

state' are characteristically found above or below the national level.[57] It appears clear that such a multi-level approach is sought in the attainment of integrated governance. Indeed, the IUCN Draft International Covenant, Rio Declaration, and Agenda 21 each call unequivocally for 'action at all levels' – international, regional, national and local – in order to effectively achieve sustainable development.[58] MLG therefore becomes a necessary byproduct of the worldwide search for governance beyond government.

Having started life in the early 1990s as a theme to political studies of Europeanisation following the Maastricht Treaty,[59] MLG has spent much of its life as a descriptive 'analytic frame' for understanding the multi-level policy constellations (supranational – national – subnational) within the European Union.[60] As a result, it was often compared with liberal intergovernmentalism as an explanation for the origins of EU policy.[61] Over time, despite MLG being 'interpreted in several ways and remain[ing] a rather fluid theoretical basis for empirical research',[62] it is becoming increasingly adopted as a normatively preferable approach to governing transboundary challenges.[63] MLG is

[57] E.g., Breslin, S. and Nesadurai, H.E.S., 'Who Governs and How? Non-State Actors and Transnational Governance in Southeast Asia', 48(2) *Journal of Contemporary Asia* 187-203.

[58] IUCN Environmental Law Programme, (2010), *Draft International Covenant on Environment and Development*, 4th Edn, Prepared in cooperation with the International Council of Environmental Law, IUCN (Gland); Supra n. 18, United Nations, 'Agenda 21', Art. 8.3; According to the 1992 Rio Declaration on Environment and Development, 'environmental issues are best handled with the participation of all concerned citizens, at the relevant levels' (UN General Assembly, (1992), *Rio Declaration on Environment and Development*, 12 August 1992, United Nations Conference on Environment and Development (adopted 13 June 1992), UN Doc. A/CONF.151/26, at Principle 10); Houghton, K., (2014), 'Identifying New Pathways For Ocean Governance: The Role of Legal Principles in Areas Beyond National Jurisdiction', 49 *Marine Policy* 118-126, at p. 122 ('These instruments call univocally for "action at all levels" – international, regional, national and local – to achieve sustainable development, directly resonating with the cooperation clause in Article 197 UNCLOS, which opens the treaty for multi-level governance approaches through regional institutions.').

[59] See Hooghe, L. and Marks, G., (2001), *Multi-Level Governance and European Integration*, Rowman & Littlefield Publishers (Lanham); Marks, G., (1993), 'Structural Policy and Multi-Level Governance in the EC', in *The State of the European Community: The Maastricht Debate and Beyond*, A. Cafruny and G. Rosenthal (Eds.), 391-411, Lynne Rienner (Boulder).

[60] Marks, G. and Hooghe, L., (2004), 'Contrasting Visions of Multi-Level Governance', in *Multi-level Governance*, I. Bache and M. Flinders (Eds.), 15-30, Oxford University Press (Oxford); Piattoni, S., (2009), 'Multi-Level Governance: A Historical and Conceptual Analysis', 31(2) *European Integration* 163-180; Stephenson, P., (2013), 'Twenty Years of Multi-Level Governance: Where Does It Come From? What Is It? Where Is It Going?', 20(6) *Journal of European Public Policy* 817-837.

[61] Fairbrass, J. and Jordan, A., (2004), 'Multi-Level Governance and Environmental Policy', in *Multi-level Governance*, I. Bache and M. Flinders (Eds.), 147-164, Oxford University Press (Oxford), at pp. 152-153.

[62] Eckerberg, K. and Joas, M., (2004), 'Multi-Level Environmental Governance: A Concept Under Stress?', 9(5) *Local Environment* 405-412, at p. 411.

[63] Kelly, G.H., (2012), 'Surveying Emissions Trading Through a Multi-Level Governance Lens', in *International Environmental Law: Contemporary Concerns and Challenges: Papers Presented at the First Contemporary Challenges of International Environmental Law Conference, Ljubljana, June 28-29, 2012*, V. Sancin (Ed.), 329-358, GV Založba (Ljubljana), at p. 358; Weibust, I. and Meadowcroft, J., (2014), *Multilevel Environmental Governance Managing Water and Climate Change in Europe and North America*, Edward Elgar (Cheltenham); c.f., Paavola, J., (2015), 'Multi-Level Environmental Governance: Exploring the Economic Explanations', 26(3) *Environmental Policy and Governance* 143-154.

therefore closely intertwined with the principle of 'subsidiarity' and the proviso that governance should occur at the lowest possible level at which it is effective.[64] Vitally, for those issues for which decision-making can cause underspills and overspills, including global public goods such as the protection of UCH, there is a need for a higher supranational level to coordinate and arbitrate between national governments in order to prevent regulatory races to the bottom and free rider effects.[65] For issues which can be effectively managed at decentralised levels, such as the management of heritage by coastal communities, the role of higher governance levels is more focused on the provision of the necessary tools, resources, rules and supervision needed to enable the subnational or community levels to act autonomously and effectively.[66]

Indeed, as explored in Chapters 4 and 5, protecting UCH produces spillover characteristics by the radiation of abstract values lost as externalities, which results in underproduction by nation states when determining their level of good production. MLG can therefore resolve these collective action failures by integrating states into regimes or processes which delegate decision-making authority and accountability to more suitable levels, such as through regional or global regimes, only in those specific areas where international law is failing to produce the public goods.[67] It also permits states to pass technical management and administrative responsibility for global goods onto more

[64] Begg, D.K.H., Wyplosz, C., Venables, A.J., Edwards, J., Sinn, H-W., Danthine, J-P., Grilli, V., Neven, D.J., Seabright, P. and Cremer, J., (1993), *Making Sense of Subsidiarity: How Much Centralization for Europe?*, Centre for Economic Policy Research (London); Van Kersbergen, K. and Verbeek, B., (2004), 'Subsidiarity as a Principle of Governance in the European Union', 2(2) *Comparative European Politics* 142–162; Bryant, R.C., (1995), *International Coordination of National Stabilization Policies*, Brookings Institution (Washington DC), at p. 31; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford), at p. 477.

[65] Van den Bergh, R., (2010), 'Private Law in a Globalising World: Economic Criteria for Choosing the Optimal Regulatory Level in a Multi-Level Government System', in *Globalization and Private Law: The Way Forward*, M. Faure and A. van der Walt (Eds.), 57-96, Edward Elgar (Cheltenham); Wälti, S., (2010), 'Multi-Level Environmental Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 411-422, Edward Elgar (Cheltenham), at p. 416; Hilson, C., (2000), *Regulating Pollution: A UK and EC Perspective*, Hart (Oxford), at pp. 29-48; Hilson, C., (2018), 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship', 7(1) *Transnational Environmental Law* 89-113; at pp. 106-108; c.f., Scharpf, F.W., (1997), 'Introduction: The Problem-Solving Capacity of Multi-Level Governance', 4(4) *Journal of European Public Policy* 520-538, at pp. 521-523.

[66] UNDP, (2004), *Decentralised Governance for Development: A Combined Practice Note on Decentralisation, Local Governance and Urban/Rural Development*, United Nations Development Programme (New York); Charbit, C., (2011), 'Governance of Public Policies in Decentralised Contexts: The Multi-level Approach', *OECD Regional Development Working Papers*, No. 2011/04, OECD Publishing (Paris).

[67] Carlarne, C. and Farber, D., (2012), 'Law Beyond Borders: Transnational Responses to Global Environmental Issues', 1(1) *Transnational Environmental Law* 13-21, at pp. 20-21; Supra n. 65, Wälti , at pp. 411-412; Bodansky, D., (2012), 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' 23(3) *European Journal of International Law* 651-668, at p. 655.

appropriate external agents and non-state actors,[68] or even to pass the blame for stringent social and environmental policies.[69] Furthermore, this externalisation of responsibility can actually enhance, rather than diminish, the capacity of civil society to coordinate and press for policies.[70]

The growing potential of MLG as an approach to managing most of the world's problems is difficult to understate. Its twin capacities of managing threatening crises and international challenges growing in severity under globalisation, while at the same time protecting and empowering disenfranchised local communities, make the strategic deployment of 'glocalism' (globalism and localism) a possible solution for managing the growing 'fragmegration' (fragmentation and integration) of a globalised world.[71] Of course, such debates on the need for balancing centralisation and decentralisation across multiple policy levels are not new. As Dunoff said in 2008, it 'is not possible to do justice to these rich literatures [which include] writings on federalism, de-centralization, European integration, globalization, and regional and multilateral regimes.'[72]

MLG is thus becoming recognised as an approach to global challenges, such as the protection of the natural environment[73] and, appositely, cultural heritage.[74] For example,

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[68] Drezner, D.W., (2004), 'The Global Governance of the Internet: Bringing the State Back In', 119(3) *Political Science Quarterly* 477-498, at p. 483; Drezner, D.W., (2007), *All Politics Is Global: Explaining International Regulatory Regimes*, Princeton University Press (Princeton).

[69] Supra n. 65, Wälti, at p. 414.

[70] Supra n. 65, Wälti, at p. 418-419; Dunoff, J.L., (2008), 'Levels of Environmental Governance', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 85-106, Oxford University Press (Oxford), at p. 97; Matz-Lück, N. and Fuchs, J., (2014), 'The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation of a Network of Paper Parks?', 49 *Marine Policy* 155-166, at p. 163.

[71] Swyngedouw, E., (2004), 'Globalisation or 'Glocalisation'? Networks, Territories and Rescaling', 17(1) *Cambridge Review of International Affairs* 25-48; Rosenau, J., (2000), 'The Governance of Fragmegration: Neither a World Republic nor a Global Interstate System', 53(5) *Studia Diplomatica* 15-40.

[72] Supra n. 70, Dunoff, at p. 86. See, e.g., Furniss, N., (1974), 'The Practical Significance of Decentralization', 36(4) *Journal of Politics* 958-982; Faguet, J., (2014), 'Decentralization and Governance', 53 *World Development* 2-13; Grendle, M.S., (2007), *Going Local: Decentralization, Democratization, and the Promise of Good Governance*, Princeton University Press (Princeton).

[73] Supra n. 65, Wälti; Supra n. 70, Dunoff; Keohane, R.O. and Victor, D.G., (2011), 'The Regime Complex for Climate Change', 9(1) *Perspectives on Politics* 7-23; Bernauer, T. and Schaffer, L.M., (2012), 'Climate Change Governance', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 441-456, Oxford University Press (Oxford); Breton, A., Brosio, G., Dalmazzone, S. and Garrone, G. (Eds.), (2007), *Environmental Governance and Decentralisation*, Edward Elgar (Cheltenham); Supra n. 61, Fairbrass and Jordan; Supra n. 67, Carlarne and Farber, at p. 18; Burris, S., Kempa, M. and Shearing, C., (2008), 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship', 4(1) *Akron Law Review* 1-66; Rauschmayer, F., Paavola, J. and Wittmer, H., (2009), 'European Governance of Natural Resources and Participation in a Multi-Level Context: An Editorial', 19(3) *Environmental Policy and Governance* 141–147.

[74] Vadi, V., (2014), 'Public Goods, Foreign Investments and the International Protection of Cultural Heritage', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 231-248, Hart (Oxford), at p. 232.

in terms of sustainably managing global fish stocks, while certain epistemic communities (e.g., International Council for the Exploration of the Sea or International Union on the Conservation of Nature),[75] standards bodies (e.g., Marine Stewardship Council or the UN Food and Agricultural Organization),[76] or advocacy NGOs (e.g., Oceana, Greenpeace or the World Wildlife Fund)[77] are more efficiently organised by providing data, technical rules, standards, schemes and political pressure at a global level; it would make sense for local communities to develop their own systems for preventing or recycling bycatch or allocating fishing zones between local stakeholders, through the use of the recommendations, tools and resources which are provided from higher levels.[78] Importantly, therefore, higher 'levels' can be used to overcome the accepted limitations of national enforcement, by encouraging or sidestepping state-level implementation.[79]

An efficient system of MLG would therefore handle the complexity and polycentricity of different governance polities, with numerous public, private and hybrid actors operating at different levels and playing different roles depending on the precise issue in question.[80] To be effective, MLG must also use an appropriate mix of centralisation and decentralisation, to permit autonomous and meaningful community self-governance at the right levels.[81] In addition, by compartmentalising different issues into different scales, it thus moves towards a more heterarchical or 'network-like' system of governance and away from the exclusive reliance on hierarchised systems of central government.[82] The

[75] International Council for the Exploration of the Sea ('ICES'), (at: http://www.ices.dk; accessed 5 January 2019); International Union for Conservation of Nature ('IUCN'), (at: http://www.iucn.org; accessed 5 January 2019).
[76] Marine Stewardship Council, (at: http://www.msc.org; accessed: 5 January 2019); Food and Agriculture Organization of the United Nations ('FAO'), (at: http://www.fao.org/home/en/; accessed: 5 January 2019).
[77] Oceana, (at: https://oceana.org/; accessed 5 January 2019); Greenpeace, (at: http://www.greenpeace.org; accessed: 5 January 2019; World Wildlife Fund ('WWF'), (at: http://www.wwf.org; accessed: 5 January 2019).
[78] Berkes, F., (1986), 'Local-Level Management and the Commons Problem: A Comparative Study of Turkish Coastal Fisheries', 10(3) *Marine Policy* 215-229; Linke, S. and Bruckmeier, K., (2015), 'Co-Management in Fisheries – Experiences and Changing Approaches in Europe', 104 *Ocean and Coastal Management* 170-181.
[79] Gunningham, N., (2012), 'Confronting the Challenge of Energy Governance', 1(1) *Transnational Environmental Law* 119-135, at pp. 119-121; Haas, P.M., (2015), *Epistemic Communities, Constructivism, and International Environmental Politics*, Routledge (Abingdon).
[80] Supra n. 70, Dunoff; Rhodes, R.A.W., (1996), 'The New Governance: Governing without Government', 44(4) *Political Studies* 652-667.
[81] Supra n. 70, Dunoff, at pp. 88-100.
[82] Jordan, A. and Schout, A., (2006), *The Coordination of the European Union: Exploring the Capacities of Networked Governance*, Oxford University Press (Oxford); Warleigh-Lack, A., (2008), 'The EU, ASEAN and APEC in Comparative Perspective', in *Europe and Asia: Regions in Flux*, P. Murray (Ed.), 23-41, Palgrave Macmillan (London); Andonova, L.B., Betsill, M.M. and Bulkeley, H., (2009), 'Transnational Climate Governance', 9(2) *Global Environmental Politics* 52-73, at pp. 56-57; c.f., Slaughter, A-M. and Hale, T., (2010), 'Transgovernmental Networks and Multi-Level Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 358-369, Edward Elgar (Cheltenham).

resulting governance system is thus 'co-regulatory' and based on the twin management functions of public actors and non-state actors. More ambitiously, one could attempt to view the resulting governance structure as a form of 'collaborative governance', i.e., based on the collective preference management of multiple (public and private) stakeholders who each seek to cooperate, coordinate and collaborate across numerous issue fields.[83] Viewing MLG in its polycentric form as network governance or collaborative governance would be in recognition of *national* governments and agencies representing 'nodes' – albeit, as argued in Chapters 8 and 10 – vitally important nodes in the wider governance network.

MLG is thus understood as the vital provision of polycentric coordination within Transnational Environmental Governance, given that the latter field is 'concerned with the migration and impact of legal norms, rules and models across borders.'[84] As Campbell et al suggested in 2016, an 'explanation for failed oceans governance is scalar mismatch; that is, a governance intervention . . . not well matched to the ecological scale of the feature or process being governed […]. The concern for scalar mismatch fuels support for governance at global or regional scales and coordination among scales.'[85] However, rather than merely viewing MLG as the realignment of scalar mismatch between *ecosystems* and *governance systems*; the following chapters go much further by exploring broader normative arguments in favour of complete regulation and regime-building at each the global, regional, and community levels, above and beyond the mere ecosystems perspective, in order to enhance the protection of UCH.

[83] Ansell, C. and Gash, A., (2008), 'Collaborative Governance in Theory and Practice', 18(4) *Journal of Public Administration Research and Theory* 543-571; Emerson, K., Nabatchi, T. and Balogh, S., (2012), 'An Integrative Framework for Collaborative Governance', 22(1) *Journal of Public Administration Research and Theory* 1-29.

[84] Shaffer, G.C. and Bodansky, D., (2012), 'Transnationalism, Unilateralism and International Law', 1(1) *Transnational Environmental Law* 31-41, at p. 31; Lin, J. and Scott, J., (2012), 'Looking Beyond the International: Key Themes and Approaches of Transnational Environmental Law', 1(1) *Transnational Environmental Law* 23-29, at p. 24.

[85] Campbell, L.M., Gray, N.J., Fairbanks, L., Silver, J.J., Gruby, R.L., Dubik, B.A. and Basurto, X., (2016), 'Global Oceans Governance: New and Emerging Issues', 41 *Annual Review of Environment and Resources* 517-543, at p. 522. See also Berkes F., (2006), 'From Community-Based Resource Management to Complex Systems: The Scale Issue and Marine Commons', 11(1) *Ecology and Society* 45-59; Gray, N.J., Gruby, R.L. and Campbell L.M., (2014), 'Boundary Objects and Global Consensus: Scalar Narratives of Marine Conservation in the Convention on Biological Diversity', 14(3) *Global Environmental Politics* 64-83.

2. Global-Level Governance

(a) The Vastness of Global Governance Discourse

It must be emphasised that the term 'global governance' encapsulates an impossibly vast topic where it is increasingly difficult for any devoted researcher to keep a handle on the wider debates, themes and permutations. As Kacowicz has said, 'there is a great confusion in the [International Relations] literature regarding the possible meanings, dynamics, and scope of global governance.'[86] Therefore, the detailed debates within this subject are beyond the aims of this study, which only seeks to examine whether global governance may be of relevance to the global protection of UCH and to make a cursory introduction of global governance theory to UCH protection. Indeed, the phrase "global governance" itself in fact captures all activities of state and non-state actors across the entire multi-level framework – including governance activities at the global, regional, national and local levels.[87] Nevertheless, this particular section will focus more broadly only on the *global* level within this literature and the additional advantages which might be available by expanding the role of non-state actors across a global network, given that the other three levels are subsequently evaluated in the chapters that follow.

With the phrase often credited to the research of James Rosenau in 1992,[88] coinciding with the establishment of the United Nations Commission on Global Governance (UNCGG) in the early 1990s,[89] global governance has been referred to as 'ubiquitous',[90] 'notoriously slippery',[91] 'vast',[92] and 'ambiguous and ill-defined'.[93] As Barnett and Duvall said in 2004, the 'idea of global governance has attained near-celebrity status. In little more than a decade the concept has gone from the ranks of the unknown to one of the central orienting themes in the practice and study of international affairs'.[94] This

[86] Kacowicz, A.M., (2012), 'Global Governance, International Order, and World Order', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 686-698, Oxford University Press (Oxford), at p. 687.
[87] Zürn, M., (2012), 'Global Governance as Multi-Level Governance', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 730-774, Oxford University Press (Oxford); Ibid, Kacowicz, at p. 690; Rosenau, J., (1995), 'Governance in the Twenty First Century', 1(1) *Global Governance* 13-43, at p. 13; Weiss, T.G. and Wilkinson, R., (2014), 'Rethinking Global Governance? Complexity, Authority, Power, Change', 58(1) *International Studies Quarterly* 207-215, at p. 207.
[88] Rosenau, J., (1992), 'Governance, Order, and Change in World Politics', in *Governance Without Government: Order and Change in World Politics*, J. N. Rosenau and E. Czempiel (Eds.), Cambridge University Press (Cambridge), 1-29.
[89] Supra n. 51, Commission on Global Governance, 'Our Global Neighbourhood'.
[90] Supra n. 87, Weiss and Wilkinson, at p. 207.
[91] Supra n. 87, Weiss and Wilkinson, at p. 207.
[92] Davis, J.W., (2012), 'A Critical View of Global Governance', 18(2) *Swiss Political Science Review* 272-286, at p. 282.
[93] Supra n. 86, Kacowicz, at p. 687.
[94] Barnett, M. and Duvall, R., (2004), 'Power in Global Governance', in *Power in Global Governance*, M. Barnett and R. Duvall (Eds.), 1-32, Cambridge University Press (Cambridge), at p. 1.

popularity has continued such that any search for the subject now would yield an impenetrably large number of results.[95] Rosenau viewed global governance as analysing the move from world order by governments (in inter-national relations), towards "governance", 'which occurs on a global scale through both the co-ordination of states and the activities of a vast array of rule systems . . . that function outside normal national jurisdictions.'[96] In other words, global governance refers to 'the entirety of regulations put forward with reference to solving specific denationalized and deregionalized problems or providing transnational common goods'.[97] Remarkably, as was found with the subject of transnational law, while there is research covering 'ocean governance' or 'global ocean governance',[98] there still seems to be some disconnect between this vast social sciences discourse, appraising all elements of world order beyond trite inter-state processes, with the wider search for an 'integrated' approach to ocean management.[99]

Given the enormity of the subject and its interdisciplinary propensity, it is perhaps more common to see global governance in a highly analytical or descriptive sense,[100] rather than a normative sense. Nevertheless, many readily accept that it has considerable normative appeal in addressing all transnational contexts given their vulnerability to free

[95] E.g., Hewson M. and Sinclair, T.J. (Eds.), (1999), *Approaches to Global Governance Theory*, State University of New York Press (Albany); Nye, J.S. and Donnahue, J.D. (Eds.), (2000), *Governance in a Globalizing World*, Brookings Institution Press (Washington DC); O'Brien, R., Goetz, A., Scholte, J.A. and Williams, M., (2000), *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements*, Cambridge University Press (Cambridge); Held, D. and McGrew, A. (Eds.), (2002), *Governing Globalization: Power, Authority, and Global Governance*, Polity Press (Cambridge); Cochrane, F., Duffy, R. and Selby, J. (Eds.), (2003), *Global Governance, Conflict and Resistance*, Palgrave Macmillan (London); Yunker, J.A., (2005), *Rethinking World Government: A New Approach*, University Press of America (Lanham); Karns, M.P. and Mingst, K.A., (2009), *International Organizations: The Politics and Processes of Global Governance*, 2nd Edn, Lynne Rienner (Boulder); Weiss, T.G. and Thakur, R., (2010), *Global Governance and the United Nations: An Unfinished Journey*, Indiana University Press (Bloomington); Weiss, T.G., (2013), *Global Governance: Why? What? Whither?*, Cambridge University Press (Cambridge); Weiss, T.G. and Wilkinson, R., (2018), *International Organization and Global Governance*, 2nd Edn, Routledge (Abingdon).

[96] Rosenau, J., (2000), 'Change, Complexity and Governance in a Globalizing Space', in *Debating Governance: Authority, Steering, and Democracy*, J. Pierre (Ed.), 167-200, Oxford University Press (Oxford), at p. 167.

[97] Supra n. 87, Zürn, at p. 730.

[98] E.g., Supra n. 85, Campbell et al.

[99] 'Global needs do sometimes give rise to governance arrangements but on many global issues, governance mechanisms have not emerged.' (Avant, D.D., Finnemore, M. and Sell, S.K., (2010), 'Who Governs the Globe?', in *Who Governs the Globe?*, D.D. Avant, M. Finnemore, M. and S.K. Sell, 1-34, Cambridge University Press (Cambridge), at p. 7).

[100] Supra n. 84, Lin and Scott, at p. 24; Dingwerth, K. and Pattberg, P., (2006), 'Global Governance as a Perspective on World Politics', 12(2) *Global Governance* 185-203; Okereke, C., Bulkeley, H. and Schroeder, H., (2009), 'Conceptualizing Climate Governance Beyond the International Regime', 9(1) *Global Environmental Politics* 58-78, at p. 71; Castells, M., (2008), 'The New Public Sphere: Global Civil Society, Communication Networks and Global Governance', 616 *Annals of the American Academy of Political and Social Science* 78-93.

riding, jurisdictional shopping, and poor state compliance.[101] It is hence entwined with the subject of global public goods as explored in Chapter 4 and the weaknesses of Westphalian sovereignty as explored in Chapter 5.[102] In this normative guise, global governance seeks to improve the coordination of the patchwork of public, private and hybrid actors having a regulatory influence upon transnational activities, with the potential for enhanced transnational democratisation, accountability, scrutiny, accuracy, and efficacy in global policy decision-making.[103] Where cooperation or regulation is failing between sovereign states, it recognises that non-state actors – such as non-governmental organisations, multinational corporations, public-private partnerships, transnational networks, epistemic communities, subnational actors, global, regional and local adjudicators and standards bodies, and stakeholder communities themselves – might possess the resources, expertise, incentive, capacity or technical knowledge to compel states or stakeholders towards the better production of global public goods.[104] In sum, the strategic utilisation of all potential global 'governors', in addition to state actors, can help to plug the gaps of production in inter-national processes and achieve 'multi-stakeholder' solutions. As noted, such governors can also operate and often do so more effectively at regional, national and local scales. However, the focus for this chapter is specifically on the capacity of such non-state actors to improve protection for UCH at the global level.

[101] Abbott, K.W. and Snidal, D., (2009), 'Strengthening International Regulation Through New Transnational Governance: Overcoming the Orchestration Deficit', 42(2) *Vanderbilt Journal of Transnational Law* 501-578; Supra n. 79, Gunningham, at p. 133; Bevir, M. and Hall, I., (2011), 'Global Governance', in *The SAGE Handbook on Governance*, M. Bevir (Ed.), 352-365, Sage Publications (Thousand Oaks), at p. 355; Supra n. 87, Weiss and Wilkinson, at p. 208.

[102] Supra n. 99, Avant, Finnemore and Sell, at p. 7; Mueller, M., (2018), 'Making the World Great Again: Using Global Public Goods to Enhance Global Governance Outcomes', *UCL Global Governance Institute Working Paper Series*, 2018/5, UCL Global Governance Institute (London).

[103] Cutler, A.C., (2003), *Private Power and Global Authority: Transnational Merchant Law in Global Political Economy*, Cambridge University Press (Cambridge); Supra n. 51, Ebbesson; Dingwerth, K. and Nanz, P., (2016), 'Participation', in *The Oxford Handbook of International Organizations*, J.K. Cogan, I. Hurd and I. Johnstone (Eds.), 1126-1145, Oxford University Press (Oxford); Nanz, P. and Steffek, J., (2004), 'Global Governance, Participation, and the Public Sphere', 39(2) *Government and Opposition* 314-335; Scholte, J.A., (2004), 'Civil Society and Democratically Accountable Global Governance', 39(2) *Government and Opposition* 211-233; Scholte, J.A. (Ed.), (2011), *Building Global Democracy? Civil Society and Accountable Global Governance*, Cambridge University Press (Cambridge); Supra n. 51, Gemmill, B. and Bamidele-Izu.

[104] See Chapter 9; Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 337; Supra n. 67, Bodansky, at p. 668; Supra n. 87, Weiss and Wilkinson, at p. 208; Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford), at pp. 59-61.

(b) Global-Level Governance and Underwater Cultural Heritage

A great deal could be said on the global governance of UCH protection, with an analysis of the multifarious public and private actors, regimes, and institutions which play a part in the governance framework for UCH. Such an analysis could not only explore the strengths, weaknesses, opportunities and threats of utilising such global governors both beyond and including national governments, but could also provide case-specific recommendations on the advantages of expanding the role of such non-state actors and legal processes. Unfortunately, however, such an expansive and detailed analysis is beyond the present focus, which is only intended to briefly introduce the subjects and concept-test the *potential* to enhance protection of UCH, by pointing to examples. While theories and methodologies approaching global governance vary, the main roles and functions of global governors have often been separated by academics into four main categories which will be relied on here: setting agendas and creating issues; making rules; implementation and enforcement; and evaluating, monitoring and adjudicating outcomes.[105]

i. Agenda setting

In terms of agenda setting, various NGOs and epistemic communities will have far greater technical knowledge, awareness of governance priorities, and an ability to more accurately represent the interests of civil society, including future generations.[106] For clarity, 'epistemic community' is a term which has come to encapsulate the global technical, scientific, and research community who have a more practical role in environmental governance.[107] Similarly, non-governmental organisations (NGOs), are often private and semi-private organisations and associations – which can be comprised of many stakeholders, including members of civil society, technical experts, academics, researchers, corporations, interest groups, associations, strategic staff, or even public

[105] Abbott , K.W. and Snidal, D., (2009), 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in *The Politics of Global Regulation*, W. Mattli and N. Woods (Eds.), 44-88, Princeton University Press (Princeton), at p. 63; Supra n. 99, Avant, Finnemore and Sell, at pp. 14-16.
[106] Kelly, R.E., (2007), 'From International Relations to Global Governance Theory: Conceptualizing NGOs after the Rio Breakthrough of 1992', 3(1) *Journal of Civil Society* 81-99; Lewis, D. and Kanji, N., (2009), *Non-Governmental Organizations and Development*, Routledge (Abingdon); Haas, P.M., (1990), 'Obtaining International Environmental Protection Through Epistemic Consensus', 19(3) *Millennium Journal of International Studies* 347-363; Supra n. 104, Martin, at pp. 59-61; Supra n. 44, Bederman, at pp. 153-154.
[107] See Haas, P.M., (1992), 'Introduction: Epistemic Communities and International Policy Coordination', 46(1) *International Organization* 1-35.

regulators and state representatives (in hybrid organisations) – who are playing an increasingly essential function in global governance.[108]

Given that much of the global impetus for the protection of UCH originally came from the archaeological and academic community, this community is particularly vocal and visible in the UCH global governance context. As Leshikar-Denton says, the 'world community of cultural and legal specialists in protection, research, and management of UCH, whose mandate is essentially the spirit of the 2001 Convention, have steadily contributed to its development, and continue to have an important role in its evolving success.'[109] In particular, one of the fundamental actors propelling the UNESCO Convention negotiations was the International Commission for Underwater Cultural Heritage (ICUCH), as a specialised arm of the International Council for Monuments and Sites (ICOMOS), as well as the International Law Association (ILA) and International Council of Museums (ICOM), all being NGOs or public-private hybrids.[110] By combining scientific, technical, and academic experts, with policymakers and diplomats, ICUCH in particular was able to wield considerable power to steer the international agenda and establish a feasibility study under the auspices of UNESCO.[111]

Another member of the epistemic community which can also have an input on agenda-setting is the Scientific and Technical Advisory Board (STAB), as instituted under Article 23 of the UNESCO Convention, to 'appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.'[112]

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[108] Supra n. 106, Lewis and Kanji; Werker, E. and Ahmed, F.Z., (2008), 'What Do Nongovernmental Organizations Do?', 22(2) *Journal of Economic Perspectives* 73-92; Charnovitz, S., (1997), 'Two Centuries of Participation: NGOs and International Governance', 18(2) *Michigan Journal of International Law* 183-286, at pp. 185-188; 'Heritage specialists may be employed in government, academia, museums, or the private sector, but much of their assistance has also been contributed through their collective voluntary work in international, regional, and national non-governmental organizations (NGOs).' (Leshikar-Denton, M.E., (2010), 'Cooperation is the Key: We Can Protect the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 85-95 at p. 89).

[109] Ibid, Leshikar-Denton, at p. 89.

[110] Maarleveld, T.J., (2007), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Origin and Consequences', in *Havets Kulturarv: de nordiske maritime museers arbejdsmøde i Torshavn*, M. Hahn-Pedersen (Ed.), 9-32, Fiskeri- og Søfartsmuseet (Esbjerg), at pp. 23-24; Grenier, R., (2006), 'Introduction: Mankind, and at Times Nature, are the True Risks to Underwater Cultural Heritage', in *Heritage at Risk Special Edition – Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts*, R. Grenier, D. Nutley and I. and Cochran (Eds.), x-xi, ICOMOS (Paris), at p. x; O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells); Henderson, G., (2014), 'The Reasons for the Convention's Drafting: A Museum-Based Maritime Archaeologist's Perspective', in *Towards Ratification: Papers from the 2013 AIMA Conference Workshop*, G. Henderson and A. Viduka (Eds.), 9-11, Australasian Institute for Maritime Archaeology (Adelaide), at pp. 10-11.

[111] Ibid.

[112] Supra n. 1, UNESCO Convention, Art. 23(5).

While this enables the Meeting of States Parties (MOP) to be informed of the latest scientific data and of essential priorities from a technical perspective, the intergovernmental foundation of the Convention means that it is the state representatives and diplomats, within the MOP, who assume the overall decision-making and agenda-setting role for the UNESCO Convention.[113] Similarly, while the STAB is intended to provide epistemic leadership and expertise, as well as keep all activities in conformance with archaeological standards,[114] it is a public-private hybrid which comprises scientists sent by state governments.[115] Yet, in defence of this, Guérin responded that 'they have to be good scientists, they cannot just be a delegate.'[116] She adds that, 'of course, non-state parties can . . . come to the meetings of states parties and to the STAB meetings to be there as observers, to encourage them to join.'[117] However, whether this provides an opportunity for non-political actors to actually steer the agenda, rather than merely observe inter-state bargaining, is another matter. For example, while the MOP have introduced a process for accrediting NGOs who can attend proceedings and even contribute,[118] it seems that these NGOs are only involved in agenda setting to the extent that they are consulted by the STAB and MOP.[119]

However, outside of UNESCO, it is possible to witness these same NGOs and epistemic actors playing a much more significant role in global agenda setting, such as by convening conferences and meetings, applying political pressure and lobbying on governments, engaging with media and civil society, and disseminating research on the condition and need for protection of UCH.[120] For example, the Society for Historical Archaeology and the Advisory Council on Underwater Archaeology have been credited for stimulating

[113] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File; UNESCO, (2009), *Rules of Procedure of the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, As adopted in the first session of the Meeting of States Parties to the Convention on 26/27 March 2009 in Paris*, UN Doc. CLT/CIH/MCO/2009/PI/99, UNESCO (Paris), at Rules 23-25.
[114] González, A.W., O'Keefe, P.J. and Williams, M., (2009), 'The UNESCO Convention on the Protection of the Underwater Cultural Heritage: A Future for our Past?', 11(1) *Conservation and Management of Archaeological Sites* 54-69, at pp. 58-59 (per O'Keefe).
[115] Supra n. 113, Guérin.
[116] Supra n. 113, Guérin.
[117] Supra n. 113, Guérin.
[118] UNESCO, (2015), *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, August 2015, Adopted by Resolution 6 / MSP 4 and Resolution 8 / MSP 5, UN Doc. CLT/HER/CHP/OG 1/REV, at pp. 16-18.
[119] UNESCO, (2015), *Statutes of the Scientific and Technical Advisory Body to the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Modified at the Fifth Session of the Meeting of States Parties to the Convention on 28/29 April 2015 in Paris*, UN Doc. CLT/CIH/MCO/2009/PI/100 REV1, UNESCO (Paris), Art. 1(e).
[120] See the list of the current accredited NGOs and reports of their activities at: UNESCO, (2018), 'Accredited Non-Governmental Organizations', (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/partners/accredited-ngos; accessed: 5 January 2019).

action in the United States towards the better protection of the *Titanic* wreck, as well as with applying pressure on the United States to observe the principles of the UNESCO Rules.[121] Agenda setting can also be in the form of either private contractors or public agencies, who can provide advocacy on behalf of UCH, perhaps during environmental impact evaluations, as amicus curiae submissions in legal cases, or in a role supporting government.[122] Taking into account findings in Chapters 3 to 5, all of this can provide a vital engine of political steering and ensures that governmental processes are better guided by the concerns of civil society and the UCH conservation community. As Chapter 4 explored in detail, any political pressure upon sovereign states remains relatively limited in effect, except to the extent that states will gain political or economic currency. Therefore, the more that these organisations can educate, inform, assemble and empower global civil society with regard to UCH protection and its values, the greater political currency which can be obtained by nation states proactively sacrificing energy and resources to address such vocalised concerns.

A key challenge therefore is improving the funding, power, voice, reach and influence of such organisations.[123] Naturally, this will also always be tempered by a concomitant need to maximise their actual and perceived authority, legitimacy or political influence, such as enhancing transparency and democratisation, or perhaps by efficiently centralising the disparate NGOs and institutions into more powerful and influential global networks or associated bodies.[124] Just as an example of where NGOs and epistemic actors could become more effective in the protection of UCH is the now-quiet ICUCH which could

[121] Supra n. 108, Leshikar-Denton, at p. 93.
[122] Chechi, A., (2015), 'Non-State Actors and Cultural Heritage: Friends or Foes?', 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 457-479, at p. 466. In terms of UCH, see generally, Dromgoole, S. (Ed.), (2006), *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, 2nd Edn, Martinus Nijhoff (Leiden). A well-known example of an amicus curiae brief in UCH-related litigation was when the United States filed a Statement of Interest in the Mercedes case supporting the claim of the Kingdom of Spain (*Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, (11th Cir., 2011), 657 F.3d 1159, at para. 1168).
[123] Supra nn. 51-53; Bieler, A., Higgott, R. and Underhill, G. (Eds.), (1999), *Non-State Actors and Authority in the Global System*, Routledge (Abingdon); Edwards, M. and Gaventa, J. (Eds.), (2001), *Global Citizen Action*, Routledge (Abingdon); Anheier, H.K., (2014), *Nonprofit Organizations: Theory, Management, Policy*, 2nd Edn, Routledge (Abingdon), at pp. 457-492; Lewis, D., (2001), *The Management of Non-Governmental Development Organizations: An Introduction*, Routledge (Abingdon).
[124] Fowler, A., (1997), *Striking a Balance: A Guide to Enhancing the Effectiveness of Non-Governmental Organisations in International Development*, Routledge (Abingdon); Risse, T., (2018), 'Hierarchical and Non-Hierarchical Coordination', in *The Oxford Handbook of Governance and Limited Statehood*, A. Draude, T.A. Börzel and T. Risse (Eds.), 312-332, Oxford University Press (Oxford); Boulding, C., (2014), *NGOs, Political Protest, and Civil Society*, Cambridge University Press (Cambridge), at pp. 35-37; Ruzza, C., (2011), 'Organised Civil Society and Political Representation in the EU Arena', in *Civil Society and International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks*, D. Armstrong, V. Bello, J. Gilson and D. Spini (Eds.), 49-70, Routledge (Abingdon).

perhaps be better funded and expanded as an influential public-private hybrid. A very suitable model, in comparison with the natural environmental agenda, could be that of the globally influential International Union for the Conservation of Nature (IUCN), which is highly effective at steering the global agenda, producing reports and recommendations for local, national and regional governors, as well as developing a global categorisation system for the endangerment of different species.[125] This could perhaps be modelled in the UCH context by producing an equivalent list of endangered UCH and steering international cooperation towards the most significant and yet threatened sites.

In other words, therefore, the task of steering global UCH policy appears to have become increasingly subsumed by the MOP, STAB and Secretariat under the UNESCO Convention, even though NGOs and epistemic actors are likely to be more effective at steering developments. For many, however, given the organised and democratic nature of national systems, their anchoring role above all other forms of decentralised governance is justified. As Guérin said, 'it's a good thing that the Convention is . . . at the centre of it all. [This can be compared to] other cases where you have several international organisations fighting for education or stuff like that. So, the 2001 Convention is quite rare in that it's only the 2001 Convention.'[126] Yet, while it is true that having a centralised global institution providing overarching governance can enhance coordination and prevent fragmentation across all the other levels, the findings with regard to the weaknesses of inter-state processes across Chapters 3 to 5, as well as state compliance in Chapter 4, would raise a particular concern if global agenda steering and overall control remained exclusively the remit of governmental delegates. As such, it will be important to also ensure that other non-state actors (NGOs, epistemic actors, private actors, researchers, civil society advocates) possess *additional* opportunities for transnational influence and agenda steering outside of this inter-state framework.[127]

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[125] See, e.g., IUCN, (2017), *Annual Report 2017*, International Union for the Conservation of Nature (Gland), (at: https://portals.iucn.org/library/sites/library/files/documents/2018-007-En.pdf; accessed: 5 January 2019).

[126] Supra n. 113, Guérin.

[127] Supra nn. 51-53 and 123; Warkentin, C., (2001), *Reshaping World Politics: NGOs, the Internet, and Global Civil Society*, Rowman & Littlefield Publishers (Lanham); Keck, M.E. and Sikkink, K., (1998), *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press (Ithaca); Nasiritousi, N., Hjerpe, M., and Linnér, B. O., (2016), 'The Roles of Non-State Actors in Climate Change Governance: Understanding Agency Through Governance Profiles', 16(1) *International Environmental Agreements: Politics, Law and Economics* 109-126; Kuyper, J.W., Linnér, B. and Schroeder, H., (2018), 'Non-State Actors in Hybrid Global Climate Governance: Justice, Legitimacy, and Effectiveness in a Post-Paris Era', 9(1) *Wiley Interdisciplinary Reviews: Climate Change* e497; Armstrong, D. and Gilson, J., (2011), 'Introduction: Civil Society and International Governance', in *Civil Society and International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks*, D. Armstrong, V. Bello, J. Gilson and D. Spini (Eds.), 1-12, Routledge (Abingdon).

ii. Rulemaking

Another key function of transnational governors within the global political framework is the development of new substantive and procedural rules. Such rules can be in the form of 'soft law' or private standard setting,[128] such as codes of conduct governing offshore activities or interaction with UCH, or those steering the purchasing policies of museums.[129] Indeed, as is often under-appreciated, an important force behind the enhanced protection of UCH over the past few decades has been the increasingly influential codes of ethical conduct within the museum community which have driven a sea change in reducing the acquisition of illicit cultural artefacts.[130] This is one area where soft law and privately developed norms have proven particularly effective.[131] It is also worth acknowledging the role of soft law and codes of conduct protecting marine cultural heritage in each state as well. In the United Kingdom, for example, you have soft law like the *Code of Seabed Development* which was drafted by the Joint Nautical

[128] E.g., Morrison, J. and Roht-Arriaza, N., (2008), 'Private and Quasi-Private Standard Setting', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 498-530, Oxford University Press (Oxford); Supra n. 44, Bederman, at p. 152; Marx, A., Maertens, M. Swinnen, J. and Wouters, J. (Eds.), *Private Standards and Global Governance: Economic, Legal and Political Perspectives*, Edward Elgar (Cheltenham); Boström, M. and Hallström, K.T., (2010), 'NGO Power in Global Social and Environmental Standard-Setting', 10(4) *Global Environmental Politics* 36-59.

[129] E.g., A number of soft law industry codes just impacting UCH in the United Kingdom, with some influence beyond, include: Wessex Archaeology, (2007), *Historic Environment Guidance for the Offshore Renewable Energy Sector*, Prepared and published by Wessex Archaeology (Salisbury) on behalf of COWRIE Ltd (Harrow); The Crown Estate, (2014), *Protocol for Archaeological Discoveries: Offshore Renewables Projects*, Published by Wessex Archaeology (Salisbury) on behalf of The Crown Estate (London); BMAPA and English Heritage, (2003), *Marine Aggregate Dredging and the Historic Environment: Guidance Note*, British Marine Aggregate Producers Association and English Heritage (London); Museums Association, (2014), *Code of Ethics for Museums*, Museums Association (London); CIfA, (2017), *Standard and Guidance for Historic Environment Desk-Based Assessment*, Updated 25 January 2017, Chartered Institute for Archaeologists (Reading); JNAPC, (1998), *Code of Practice for Seabed Developers*, 2nd Edn, Joint Nautical Archaeology Policy Committee (York); English Heritage, (2008), *Conservation Principles: Policies and Guidance for the Sustainable Management of the Historic Environment*, English Heritage (London); Wessex Archaeology, (2012), *Fishing Industry Protocol for Archaeological Discoveries, Protocol Handbook, 2016–2018 Sussex IFCA Project, April 2016*, Wessex Archaeology (Salisbury) on behalf of Historic England (London); British Sub Aqua Club, 'Respect our Wrecks Policy', (at: https://www.bsac.com/advice-and-support/respect-our-wrecks/respect-our-wrecks-policy/; accessed 5 January 2019); Historic England, (2015), *Accessing England's Protected Wreck Sites Guidance Notes for Divers and Archaeologists*, Historic England (London).

[130] Bryant, C.R., (2001), 'The Archeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks', 65 *Albany Law Review* 97-145, at p. 109.

[131] Fiorentini, F., (2015), 'A Legal Plurality Approach to International Trade in Cultural Objects', in *Handbook on the Law of Cultural Heritage and International Trade*, J.A.R. Nafziger and R.K. Paterson (Eds.), 589-622, Edward Elgar Publishing, at p. 606; O'Keefe, P.J., (1998), 'Codes of Ethics: Form and Function in Cultural Heritage Management', 7(1) *International Journal of Cultural Property* 32-51; Supra n. 122, at pp. 461-462; Frigo, M., (2015), 'The Impact of the UNIDROIT Convention on International Case Law and Practice: An Appraisal', 20(4) *Uniform Law Review* 626-636, at p. 636; Also see, ICMM, (1993), *Underwater Archaeology Resolutions*, Adopted by the International Congress of Maritime Museums, 10 September 1993 (Barcelona), (at: https://archive.asia.si.edu/exhibitions/SW-CulturalHeritage/downloads/ICMMArchaeologyPolicy.pdf; accessed: 5 January 2019).

Archaeology Policy Committee[132] and the *Protect Our Wrecks* guidelines promoted by the British Sub Aqua Club.[133]

It is also common for non-state actors to have an input on the development of new national or international laws. A good example in the context of UCH being the Annexed Rules, which started life as the ICOMOS Charter drafted by archaeology experts within ICUCH, before becoming adopted in the Annex of the UNESCO Convention.[134] As the Rules themselves prove, the use of non-state actors in the development of legal rules can be particularly effective for a number of reasons. For example, they can be quicker to create and the use of technical experts or stakeholders in their development can ensure that they are more practicable and suitable for application 'on the ground'.[135] Furthermore, the rules are capable of attracting better compliance and even legitimacy, if originating from those perceived to have a technical knowledge or expertise on the subject.[136]

Of course, the counter-argument runs that national (and international) law must have its ultimate source in the state, as a democratically appointed governor responsible for balancing all competing interests.[137] Nevertheless, the interoperation between the two can still create particularly effective law, or 'co-regulation'.[138] Indeed, it is also imminently possible for rules to start out as social customs, community norms, or

[132] Supra n. 129, JNAPC, 'Code of Practice for Seabed Developers'.
[133] British Sub Aqua Club, 'Code of Conduct for Wreck Divers', (at: https://www.bsac.com/safety/safe-diving-guide/the-divers-code-of-conduct; accessed 5 January 2019).
[134] ICOMOS, (1996), *Charter on the Protection and Management of Underwater Cultural Heritage*, 11th ICOMOS General Assembly, October 1996 (Sofia), (at: https://www.icomos.org/charters/underwater_e.pdf; accessed: 5 January 2019); Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.
[135] Bartle, I. and Vass, P., (2005), *Self-Regulation and the Regulatory State: A Survey of Policy and Practice*, University of Bath School of Management, Research Report 17, (at: http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/17_Bartle_Vass.pdf; accessed: 5 January 2019), at p. 2; Faure, M., (2012), 'Balancing of Interests: Some Preliminary (Economic) Remarks', *The Balancing of Interests in Environmental Law in Africa*, M. Faure and W. du Plessis (Eds.), 1-34, Pretoria University Law Press (Pretoria), at p. 23.
[136] Collingwood, V., (2006), 'Non-Governmental Organisations, Power and Legitimacy in International Society', 32(3) *Review of International Studies* 439-454, at pp. 447-448; Matten, D. and Moon, J., (2008), '"Implicit" and "Explicit" CSR: A Conceptual Framework for Comparative Understanding of Corporate Social Responsibility', 33(2) *Academy of Management Review* 404-424, at pp. 411-412; Bernstein, S. and Cashore, B., (2004), 'Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?', in *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, J.J. Kirton and M.J. Trebilcock (Eds.), 33-63, Routledge (Abingdon).
[137] See Chapter 8. Raz, J., (1979), *The Authority of Law: Essays on Law and Morality*, Clarendon Press (Wotton-under-Edge); Wheatley, S., (2010), *The Democratic Legitimacy of International Law*, Hart (Oxford); c.f., Buchanan, A. and Keohane, R. O., (2006), 'The Legitimacy of Global Governance Institutions', 20(4) *Ethics and International Affairs* 405-437; Bartelson, J., (2010), 'Beyond Democratic Legitimacy: Global Governance and the Promotion of Liberty', in *Transnational Actors in Global Governance: Patterns, Explanations and Implications*, C. Jönsson and J. Tallberg (Eds.), 218-236, Palgrave Macmillan (London).
[138] See Chapter 9, Section 3 and Chapter 10.

transnational policies, before being absorbed by effective bottom-up processes into better quality higher-level legal norms.[139] Another crucial NGO in the genesis of the UNESCO Convention was the global non-profit NGO, the ILA, which carried the mantle forward from ICUCH to establish negotiations over a proposed new Convention at UNESCO and drafted the first effort of the Convention.[140] Not only has the ILA played a key role in the initial formulation of rules, therefore, but it has also played a vital agenda steering role as well.

While there is no overarching global regulatory regime for UCH, beyond intergovernmental treaties such as the LOSC and UNESCO Convention, there are other global regimes providing additional rulemaking which offer some indirect protection. For example, a number of powerful multilateral and near-global environmental agreements might also indirectly protect UCH, such as the World Heritage Convention.[141] As raised in Chapter 4, while the World Heritage Convention is also an inter-state treaty, it possesses considerable internal compliance pull by the incentive to secure tourism at listed sites.[142] UCH may also be found within marine protected areas where management rules are modelled on guidelines from the IUCN, World Wildlife Fund, Organisation for Economic Co-Operation and Development, United Nations Food and Agricultural Organization, or under the Convention on Biological Diversity.[143]

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[139] Levit, J.K., (2005), 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments', 30(1) *Yale Journal of International Law* 125-209; Sabel, C.F. and Victor, D.G., (2017), 'Governing Global Problems Under Uncertainty: Making Bottom-Up Climate Policy Work', 144(1) *Climatic Change* 15-27.

[140] O'Keefe, P.J., (1996), 'Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention', 20(4) *Marine Policy* 297-307.

[141] The SS *President Coolidge* is the only shipwreck site to be added to World Heritage Tentative List (UNESCO World Heritage Tentative List, 'The President Coolidge', (at http://whc.unesco.org/en/tentativelists/1972/; accessed 6 January 2019). However, the *Red Bay Basque Whaling Station* 'includes … underwater remains of vessels and whale bone deposits' (UNESCO World Heritage List, 'Red Bay Basque Whaling Station', (at http://whc.unesco.org/en/list/1412; accessed 6 January 2019)) and the *Gros Morne National Park* features the wreckage of the SS *Ethie* (UNESCO World Heritage List, 'Gros Morne National Park', (at http://whc.unesco.org/en/list/419; accessed: 6 January 2019)).

[142] Goodwin, E.J., (2009), 'The World Heritage Convention, the Environment, and Compliance', 20(2) *Colorado Journal of International Environmental Law and Policy* 157-198.

[143] E.g., Kelleher, G., (1999), *Guidelines for Marine Protected Areas*, International Union for the Conservation of Nature (Gland); Reuchlin-Hugenholtz, E. and McKenzie, E., (2015), *Marine Protected Areas: Smart Investments in Ocean Health*, WWF (Gland); Westlund, L., Charles, A., Garcia S. and Sanders, J. (Eds.), (2017), 'Marine Protected Areas: Interactions with Fishery Livelihoods and Food Security', *FAO Fisheries and Aquaculture Technical Paper*, No. 603, FAO (Rome); OECD, (2017), *Marine Protected Areas: Economics, Management and Effective Policy Mixes*, OECD Publishing (Paris); Conference of the Parties to the Convention on Biological Diversity, (2004), *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting*, VII/5. Marine and Coastal Biological Diversity, Seventh Meeting, 9-20 and 27 February 2004 (Kuala Lumpur), UN Doc. UNEP/CBD/COP/DEC/VII/5.

Private laws propounded by the International Maritime Organization and Comité Maritime International relating to issues such as shipping safety, pollution, salvage, and navigation, could also carry indirect benefits for UCH.[144] There is also the intergovernmental International Seabed Authority (ISA), instituted under Part XI of the LOSC to oversee deep seabed mining in the Area in accordance with that Convention, which is likely to have an indirect rulemaking role to play over affected UCH in the Area.[145] Non-state actors can also play a crucial role in assisting states with improving their laws by facilitating cross-fertilisation through dialogue, comparative studies and a network of rules and best practices. However, this is a role which has perhaps not really been taken by non-state actors in the context of UCH yet. As O'Keefe has said:

> 'At the present moment there is no body which collects information on legal developments […]. There is very little sharing of information on this among States. One reason is that most legal developments are related to municipal law and there has been little contact between lawyers from different States and legal systems. The need for shared information has not been considered a priority'.[146]

In reality, however, as is the principal argument of this study, there is currently too much emphasis on the interests of sovereign states, rather than the interests of the global community and future generations, with regard to global public goods, such as UCH. Any international legal rulemaking processes which has so far been used to protect UCH have often been curtailed, blunted and even rejected by national governments, who have a tendency to prefer ambiguous rules which can be implemented autonomously and ad hoc, with minimal external interference.[147] To many, this grip on the key lawmaking process is not just more accountable and democratically legitimate, or more familiar and easier to understand, but is the result of the state's exclusive right to govern and have a monopoly on the public's use of force.[148] However, as has been argued in Chapters 3 to 5, this exclusive sovereignty over UCH law by states is at risk of, at various times, becoming

[144] As an example, the IMO's International Convention on the Removal of Wrecks (Nairobi Convention) contains rules on reporting potentially hazardous wrecks discovered by maritime operators (The Nairobi International Convention on the Removal of Wrecks, (adopted 18 May 2007 (Nairobi); in force 14 April 2015), Cm 8243).
[145] Supra n. 104, Dromgoole, at p. 263; Supra n. 1, UNESCO Convention, Arts. 11 and 12; Supra n. 2, LOSC, at Part XI.
[146] Supra n. 110, O'Keefe, at p. 92.
[147] See Chapters 4 and 5.
[148] Supra n. 137; See Chapters 5 and 8.

counter-productive. As such, workarounds can and do exist, for example: regional and global institutions with a greater capacity to create, resolve and enforce directly applicable norms in courts possessing normative or enforcement power in lieu of states; or systems which permit affected transnational communities to craft, interpret and apply the legal rules impacting them from across the transnational space; or systems possessing supranational adjudication and enforcement, which can override sovereign individual preference-setting.[149]

A further argument against such non-state rulemaking, in addition to the obvious and ever-present concerns of democratic legitimacy and accountability as noted above, might be the nation state's better connection with the issue at hand and with the social and legal context, as well as actors involved.[150] Although, arguably, not only can states be equally, if not more, disassociated from local contexts and interests, but it is important to recognise that 'global' rules are only intended to arise in specific situations where state action is defective from a global or regional perspective.[151] Transnational governance is thus designed to ensure responsibility and accountability of actors having a transnational impact who can, at present, disregard globally or regionally agreed rules and standards, while shielded by defective domestic law or inaccessible private international law. As a result, Chapter 8 revisits some of these arguments in favour of maintaining the national-international legal architecture, particularly in those areas with little transboundary spillover, as well as highlighting those areas where the inter-national architecture needs bolstering by global, regional, transnational and local regulatory networks.

iii. Implementation and enforcement

The principal form of 'implementation' in the context of international UCH protection is the transplantation by national governments of international agreements, such as the LOSC or the UNESCO Convention, or regional treaties such as the Valletta Convention, into domestic law.[152] This includes private law harmonisation treaties such as the IMO

[149] See Chapter 7 (on regional-level governance) and Chapter 9 (on community-level governance).
[150] Broude, T. and Shany, Y., (2008), 'Introduction', in *The Shifting Allocation of Authority in International Law Considering Sovereignty, Supremacy and Subsidiarity*, T. Broude and Y. Shany (Eds.), 1-16, Hart (Oxford), at p. 5; Helfer, L.R. and Slaughter, A., (1997), 'Toward a Theory of Effective Supranational Adjudication Source', 107(2) *The Yale Law Journal* 273-391, at pp. 335-336.
[151] Supra nn. 64 and 66; Davies, G., (2008), 'Subsidiarity as a Method of Policy Centralisation', in *The Shifting Allocation of Authority in International Law Considering Sovereignty, Supremacy and Subsidiarity*, T. Broude and Y. Shany (Eds.), 79-98, Hart (Oxford).
[152] European Convention on the Protection of the Archaeological Heritage (Revised), (adopted 16 January 1992 (Valletta), in force 25 May 1995), Council of Europe, ETS No. 143.

1989 Salvage Convention,[153] as well as bilateral agreements and MOUs between states relating to UCH.[154] In the case of UCH, there is no significant supranational or non-state legislation which can override this domestic-level implementation and enforcement. Nevertheless, for transnational standards or soft law which impact across maritime and industry sectors, such as guidelines or codes of conduct, there is inevitably going to be stakeholder-level implementation and enforcement.[155] Unfortunately, the profit-orientation of most industries using such codes to minimise their impacts on UCH, as well as their 'soft' legal nature and lack of oversight by external actors, means that internal compliance cannot be guaranteed.[156]

Different states may also delegate implementation of rules to subnational actors, public-private agencies or, rarely, to stakeholder communities themselves, in order of decreasing regularity. Greater decentralised responsibility for UCH also occurs in federalised and regionalised national polities.[157] Non-state actors can also play a role in guiding states in the implementation of global UCH law. For example, most of the reports written for national governments on the role and impact of the Convention, as well as UNESCO's implementation manual for the Annexed Rules, utilise the expertise of the underwater archaeology community and NGOs.[158] As Maes responds, effective collaboration between 'governments, governmental agencies and scientists' is key in providing the level of implementation needed to address UCH protection.[159]

Non-state actors are not just capable of having some role in *implementation*, but can also play a role in *enforcement*. For example, by attaching certain private rights to individuals – such as property and personal rights – it is possible for a state's nationals to enforce any private interests in UCH in national courts, which may include its protection from theft, damage or interference.[160] Similarly, national citizens, local communities, and NGOs –

[153] International Convention on Salvage, (adopted 28 April 1989 (London), in force 14 July 1996), 1953 UNTS 165.
[154] See Chapter 4, Section 3; Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File.
[155] See supra n. 129.
[156] See Chapter 4, Section 3.
[157] E.g., Much UCH law in Germany, Spain and Italy is devolved to the various internal regions (e.g., supra n. 154, Manders). See Chapter 9.
[158] See Maarleveld, T. J., Guérin, U. and Egger, B. (Eds.), (2013), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO (Paris).
[159] Maes, F., (2018), Written Response of Frank Maes, 16 March 2018, Filed with Author; Supra n. 108, Leshikar-Denton, at pp. 89-93.
[160] Francioni, F., (2011), 'The Human Dimension of International Cultural Heritage Law: An Introduction', 22(1) *European Journal of International Law* 9-16, at pp. 9-10.

while not enforcing private rights – may provide indirect enforcement by representing the interests of UCH during court or public hearings, or within environmental impact assessments and consultations on proposed projects. Again, however, the legal rules devised to empower stakeholders through such procedures remain under the direction of the nation state and so are quite likely to consciously or unconsciously limit the actual impact of any non-state actors who oppose the short-term economic interests of their governments.[161] In fact, given its often ambiguous provenience, it is rare to find in situ UCH which is wholly owned by a private individual who can enforce any rights to see it protected.[162] Nevertheless, cases do exist of local communities sharing in the ownership of UCH.[163] Although, given that a core aim of the recent UNESCO Convention was to address a global trend for commercialising UCH, it is still common to find private rights over UCH which relate to its private salvage or ex situ propertisation.

Another common international commitment for states and non-state actors regarding global public goods, although often couched in hortatory language, is an agreement to support capacity building for under-developed regions who could benefit from resources, skills, training, and leadership in resolving collective action challenges.[164] This lack of capacity for under-developed regions is perhaps the most critical issue in terms of ensuring proper compliance with treaties in these regions, where poor infrastructure and under-resourced public agencies often struggle to achieve effective implementation and enforcement.[165] For example, MacKintosh's 2018 doctoral study into the implementation of the UNESCO Convention across the Adriatic Sea found that a major factor behind poor

[161] See Martin, J.B. and Gane, T., (2019), 'Weaknesses in the Law Protecting the United Kingdom's Remarkable Underwater Cultural Heritage: A Call for Modernisation and Reform', *Journal of Maritime Archaeology* (Forthcoming). See Chapters 4 and 9.
[162] An example of in situ heritage owned by a private owner, for example, is the RMS *Lusitania* (see Martin, J.B., (2018), 'Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: The *Titanic* and *Lusitania* as World Heritage Sites', 33(1) *International Journal of Marine and Coastal Law* 116-165, at pp. 144-145).
[163] See Chapter 9.
[164] Gündling, L., and Navid, D., (1996), 'Compliance Assistance in International Environmental Law: Capacity-Building through Finance and Technology Transfer', 56(3-4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 796-809; Potter, C. and Brough, R., (2004), 'Systemic Capacity Building: A Hierarchy of Needs', 19(5) Health Policy and Planning 336–347; UNDP, (2009), *Supporting Capacity Building: The UNDP Approach*, United Nations Development Programme (New York).
[165] Brown Weiss, E. and Jacobson, H.K. (Eds.), (1998), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, MIT Press (Cambridge, MA); Levy, M.A., Keohane R.O. and Haas, P.M., (1993), 'Improving the Effectiveness of International Environmental Institutions', in *Institutions for the Earth: Sources of Effective International Environmental Protection*, P.M. Haas, R.O. Keohane and M.A. Levy (Eds.), 397-416, MIT Press (Cambridge, MA), at p. 404; Supra n. 154, Manders; Supra n. 113, Guérin.

implementation was a lack of state resources.[166] Consequently, in order to improve the achievement of the capacity building commitments under UNESCO Convention Articles 19 and 21, for example, the MOP and Secretariat have created the *UNITWIN* network to improve research collaboration and the networking of skills and resources among universities within states parties.[167]

It is towards these important commitments – the provision of research collaboration, skills training, and capacity building – that non-state actors can be seen as particularly active in the implementation of the UNESCO Convention. As Guérin highlighted in interview, the Secretariat and MOP see an essential part of their role as being the coordination and encouragement of such transnational networking and capacity building among stakeholders.[168] This particularly involves sending the STAB to those regions, to provide support and expertise.[169] Unfortunately, despite the positive long-term changes resulting from this enhanced education and assistance, the funding available for such ground-up development is still limited to ad hoc training of targeted communities, with most nations still lacking the wider public infrastructure needed for meaningful implementation and enforcement.[170]

It is also important to consider the role of other global governors and non-state actors in providing additional enforcement powers through traditional judicial apparatus within national and international law. Here it is possible to find intergovernmental tribunals and courts which might be eventually implicated in the adjudication and consequent enforcement of inter-state law, such as the International Court of Justice, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration, and ad hoc arbitration.[171] The ISA is another intergovernmental organisation overseeing the implementation and enforcement of international commitments relating to the Area which could impact UCH.[172] However, there is little in the way of a global supranational court

[166] Mackintosh, R., (2018), MacKintosh, R.F., (2018), *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Implementation and Effectiveness*, University of Southampton, Doctoral Thesis.
[167] UNESCO, (2013), *Convention on the Protection of the Underwater Cultural Heritage, Meeting of States Parties: Information Document INF.1 Secretariat Report*, 8 February 2013 (Paris), UN Doc. UCH/13/4.MSP/220/INF.1 REV2, at s. 8.
[168] Supra n. 113, Guérin.
[169] Supra n. 113, Guérin.
[170] Supra n. 154, Manders; Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.
[171] Supra n. 1, UNESCO Convention, Art. 25; Supra n. 2, LOSC, Art. 287.
[172] Supra n. 145.

or enforcement body, such as a World Environment Organization, which could oversee implementation or engage in enforcement activities for cultural heritage protection.[173]

Perhaps most critical of all in terms of non-state actor enforcement, is the emerging consensus among many scholars that domestic constitutional norms – such as the rule of law, separation of powers, human rights, democracy and solidarity – are transmigrating to the global level, thus providing a counterforce to sovereign supremacy.[174] This potential constitutionalisation of international law has been welcomed by many environmental law scholars, who see a particular potential for enhanced state accountability in the observation of environmental and cultural rights of the international community.[175] However, the difficulty with such a *political* system of legitimisation is immediately obvious: when it eventually comes to enforcement within the domestic *legal* context, states will continue to determine the extent to which such constitutional norms even exist or, more importantly, the extent to which they should override their sovereign constitutions.[176] In the human rights context, this can be significantly ameliorated by supranational courts, such as the European Court of Human Rights (ECHR) or Inter-American Court of Human Rights (IACHR). However, there remain serious concerns with achieving compliance by sovereign states under such "supranational" courts, given that they remain framed within the hardened dualist conception of international law which

[173] See Chapter 3, Section 2(c).

[174] Klabbers, J., Peters, A. and Ulfstein, G., (2011), *The Constitutionalization of International Law*, 2nd Edn, Oxford University Press (Oxford); Peters, A., (2012), 'Are We Moving Towards Constitutionalization of the World Community?', in *Realizing Utopia - The Future of International Law*, A. Cassese (Ed.), 118-135, Oxford University Press (Oxford); Lang, A.F. and Wiener, A. (Eds.), (2017), *Handbook on Global Constitutionalism*, Edward Elgar (Cheltenham); Belov, M. (Ed.), (2018), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, Hart Publishing (Oxford); Peters, A., (2009), 'The Merits of Global Constitutionalism', 16(2) *Indiana Journal of Global Legal Studies* 397-412.

[175] Kotzé, L., (2019), 'A Global Environmental Constitution for the Anthropocene?', 8(1) *Transnational Environmental Law* 11-33; Abate, R., (2017), *Climate Justice: Case Studies in Global and Regional Governance Challenges*, Environmental Law Institute (Washington DC); Bosselmann, K., (2015), 'Global Environmental Constitutionalism: Mapping the Terrain', 21(2) *Widener Law Review* 171-186; May, J.R. and Daly, E., (2014), *Global Environmental Constitutionalism*, Cambridge University Press (Cambridge); Boyle, A., (2006), 'Human Rights or Environmental Rights? A Reassessment', 18(3) *Fordham Environmental Law Review* 471-511.

[176] Nagel, T., (2005), 'The Problem of Global Justice', 33(2) *Philosophy & Public Affairs* 113-147; Rosenfeld, M., (2014), 'Is Global Constitutionalism Meaningful or Desirable?', 25(1) *European Journal of International Law* 177-199; Hirschl, R., (2018), 'Opting Out of "Global Constitutionalism"', 12(1) *Law & Ethics of Human Rights* 1-36; Young, E.A., (2003), 'The Trouble With Global Constitutionalism', 38(3) *Texas International Law Journal* 527-545; Atilgan, A., (2018), *Global Constitutionalism: A Socio-Legal Perspective*, Springer (New York); Nardin, T., (2011), 'Justice and Authority in the Global Order', 37(5) *Review of International Studies* 2059–2072; O'Donoghue, A., (2013), 'International Constitutionalism and the State', 11(4) *International Journal of Constitutional Law* 1021-1045; Pallotta, O.M., (2019), 'Is Greta Thunberg Revealing the Weaknesses of Global Constitutionalism?', *The Good Lobby*, 26 March 2019, (at: http://thegoodlobby.eu/greta-thunberg-weaknesses-global-constitutionalism/; accessed 1 May 2019).

shields nation states from 'external' enforcement.[177] Another fundamental difficulty with relying on human rights courts to protect cultural and environmental interests is that it is far too difficult to locate peremptory norms, beyond perhaps those of clear contra bonos mores or jus cogens,[178] which place universal jurisdiction in humankind and actual responsibility and accountability upon all states for such complex collective action problems.[179]

The rich literature exploring the potential for erga omnes ('towards all') norms, perhaps arising in the context of 'common concerns of humankind', such as in the protection of the cultural and natural environment, is unfortunately beyond the space and scope of this study.[180] However, it is worth pointing to a recent and illustrative case in the context of this study, which evidences the obvious difficulties with locating such sovereignty-constraining norms. In *Ahunbay and Others v. Turkey* (2019), the ECHR heard an appeal from a team of archaeologists who campaigned to prevent the construction of the Ilisu dam which would flood and cause significant destruction of much of the Hasankeyf archaeological site in Batman (Turkey), as well as irreparably harming the surrounding

[177] Fikfak, V., (2018), 'Changing State Behaviour: Damages before the European Court of Human Rights', 29(4) *European Journal of International Law* 1091-1125; Hathaway, O., (2002), 'Do Human Rights Treaties Make a Difference?', 111(8) *Yale Law Journal* 1935-2042; Posner, E.A. and Yoo, J.C., (2005), 'Judicial Independence in International Tribunals', 93(1) *California Law Review* 1-74; Hawkins, D. and Wade, J., (2010), 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights', 6(1) *Journal of International Law and International Relations* 35-86; Cassel, D., (2001), 'Does International Human Rights Law Make a Difference?', 1(2) *Chicago Journal of International Law* 121-136; Hillebrecht, C., (2014), 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change', 20(4) *European Journal of International Relations* 1100-1123; Huneeus, A., (2011), 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', 44(3) *Cornell International Law Journal* 493-534; Bradley, C.A., (1999), 'Breard, Our Dualist Constitution, and the Internationalist Conception', 51(3) *Stanford Law Review* 529-566; Hafner-Burton, E.M. and Tsutsui, K., (2007), 'Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most', 44(4) *Journal of Peace Research* 407-425.

[178] Criddle, E.J. and Fox-Decent, E., (2009), 'A Fiduciary Theory of *Jus Cogens*', 34(2) *Yale Journal of International Law* 331-388; Bianchi, A., (2008), 'Human Rights and the Magic of *Jus Cogens*', 19(3) *European Journal of International Law* 491-508; Bassiouni, M.C., (1996), 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59(4) *Law and Contemporary Problems* 63-74.

[179] Bodansky, D., (2009), 'Is There an International Environmental Constitution?', 16(2) *Indiana Journal of Global Legal Studies* 574-580; Fitzmaurice, M., (2008), 'International Responsibility and Liability', in *The Oxford Handbook of International Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 1010-1036, Oxford University Press (Oxford), at p. 1020; Kiss, A., (2005), 'The Legal Ordering of Environmental Protection', in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, R. MacDonald and D. Johnston (Eds.), 567-584; Brunnée, J., (2008), 'Common Areas, Common Heritage and Common Concern', in *The Oxford Handbook of International Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 550-573, Oxford University Press (Oxford), at pp. 553-557; Nanda, V.P. and Pring, G.R., (2012), *International Environmental Law in the 21st Century*, 2nd Edn, Martinus Nijhoff (Leiden), at pp. 39-40; von Bogdandy, A., Golmann, M. and Venzke, I., (2016), 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', *MPIL Research Paper Series*, No. 2016-02, Max Planck Institute for Comparative Public Law and International Law (Heidelberg), at p. 20; International Law Commission, (2000), *Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/507, United Nations (Geneva).

[180] Ibid.

ecology and landscape.[181] They appealed relying on the European Convention's right to respect for private life (Article 8) and the right to education (Article 2 of Protocol No. 1),[182] making a compelling case that destruction of cultural heritage in this manner by Turkey would be an act contrary humanity's right to education and enjoyment of such cultural heritage. In its judgment, the ECHR tried to speak positively about some potential future uses for human rights courts in supporting environmental concerns; but had to concede that they could not find any emerging consensus of such customary rules across European *states*. Instead, they merely reiterated the well-known potential for human rights to respond to the cultural interests of minority and indigenous communities and, in effect, affirming that human rights provide little authority to moderate state freedom to adjudge such cultural or environmental matters autonomously.

The emerging picture of constitutional norms potentially migrating into the international and transnational sphere is thus not a significant development in international environmental law and must be understood as a very slow, tedious and unreliable path to imminent environmental and cultural protection. It certainly does not provide any form of panacea or remedy to the issues raised in Chapters 3 to 5. Much of humankind's interests in preserving cultural and environmental values therefore continues to be represented in global law in either domestic or transnational settings, as explored elsewhere in this study. Nevertheless, as shown above, non-state actors, NGOs and global governors are still capable of playing an increasingly essential part in enforcing a growing body of rules, both with and without international law.

iv. Evaluating and monitoring outcomes

A variety of non-state actors should also play an increased role with regard to the ongoing monitoring and evaluation of all such regulatory and governance systems.[183] For

[181] *Ahunbay and Others v. Turkey* (2019), European Court of Human Rights, 29 January 2019, (Application No. 6080/06).

[182] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (adopted 4 November 1950, in force 3 September 1953), Council of Europe, ETS 5.

[183] Ryngaert, C., (2016), 'Non-State Actors: Carving out a Space in a State-Centred International Legal System', 63(2) *Netherlands International Law Review* 183-195, at p. 189; Kaul, I., (2012), 'Rethinking Public Goods and Global Public Goods', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 37-54, MIT Press (Cambridge, MA), at p. 44; Supra n. 51, Ebbesson; Bhamra, A.S., Nagrath, K. and Niazi, Z., (2015), 'Role of Non-State Actors in Monitoring and Review for Effective Implementation of the Post-2015 Agenda: A Case Study Analysis', *Independent Research Forum Background Paper*, Vol. 4; Ardia, D.S., (1997), 'Does the Emperor Have No Clothes - Enforcement of International Laws Protecting the Marine Environment', 19(2) *Michigan Journal of International Law* 497-568.

example, although national governments are responsible for implementing commitments under the LOSC and UNESCO Convention, a valuable role is played by NGOs, epistemic actors, and civil society in applying political pressure on states to join such regimes or to keep up their end of the bargain by implementing and enforcing meaningful legislation.[184] As Maes noted in his response, the Expert Workshop held at Ghent University in 2015 under the *SeArch* project – which brought together UCH experts and government delegates in North-Western Europe – was likely to have played some beneficial role in encouraging the Netherlands and Germany to recently declare their intention to ratify the UNESCO Convention.[185] Similarly, Peeters responded noting his belief that the *North Sea Prehistory Research and Management Framework*, led by himself and other academic collaborators across the North Sea, 'set the stage for serious involvement' of national agencies in responding to the challenges for UCH across the sea basin.[186] These same private actors also play a vital role in the ongoing research and public dissemination of strengths, weaknesses, opportunities, and threats relating to current UCH protection efforts.[187] Similarly, academic researchers, norm entrepreneurs, and technological innovators can create new ideas and approaches to enhance UCH protection or provide critical scrutiny of current management regimes.[188]

However, what appears to be missing from the UNESCO framework for the protection of UCH is a system for monitoring state compliance within an ongoing 'Implementation Review'.[189] Implementation or compliance review processes – providing an opportunity for states parties to closely monitor one another's implementation of treaty commitments

[184] See e.g., JNAPC, (2011), *Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK, Proceedings of the JNAPC 21st Anniversary Seminar, Burlington House, November 2010*, R.A. Yorke (Ed.), Published by Nautical Archaeology Society (Portsmouth) for the Joint Nautical Archaeology Policy Committee (York); Supra n. 166, Mackintosh.
[185] Supra n. 159, Maes.
[186] Peeters, H., (2018), Written Response of Hans Peeters, 28 April 2018, Filed with Author.
[187] Ibid; See e.g., DeRudder, T. and Maes, F. (Eds.), (2015), *Workshop: The Legal Protection of Underwater Cultural Heritage 23 April 2015 – Final Report*, Maritime Institute, University of Ghent (Ghent), (at: http://www.vliz.be/imisdocs/publications/ocrd/274121.pdf; accessed 9 January 2019); Special Issue: 'Conserving Marine Cultural Heritage', (2009), 9(1) *Conservation and Management of Archaeological Sites* 1-77.
[188] Ibid; See e.g., Bruno, F., Lagudi, A., Barbieri, L., Muzzupappa, M., Mangeruga, M., Pupo, F., Cozza, M., Cozza, A., Ritacco, G., Peluso, R. and Tusa, S., (2017), 'Virtual Diving in the Underwater Archaeological Site of Cala Minnola', XLII-2/W3 *ISPRS-International Archives of the Photogrammetry, Remote Sensing and Spatial Information Sciences* 121-126; WreckProtect, (2011), *Guidelines for Protection of Submerged Wooden Cultural Heritage, including Cost-Benefit Analysis*, M. Manders (Ed.), WreckProtect (Amersfoort); MACHU, (2008), *MACHU Report, Managing Cultural Heritage Underwater – Number 1*, R. Oosting and M. Manders (Eds.), MACHU (Amersfoort).
[189] Supra n. 170, Williams; Mackintosh, R., (2016), *The 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage: Implementation and Enforcement in the Adriatic – HFF Grant Report*, Honor Frost Foundation, (at: http://honorfrostfoundation.org/wp/wp-content/uploads/2017/05/The-2001-UNESCO-CPUCH-Rob-MacKintosh-2016-Final-Report.pdf; accessed: 9 January 2019).

and to provide greater political pressure on non-compliers and to propose new approaches or collaborative solutions to overcoming insufficient capacities – have become particularly prevalent within multilateral environmental agreements.[190] As Klabbers has said, '[c]ompliance (or non-compliance) procedures are usually said to exist, and be necessary in international environmental protection because the environment cannot, for a number of reasons, be entrusted to the workings of traditional international law.'[191] Including such a process, while still restricted to inter-state compliance monitoring and pressure, could enhance the opportunity to explore collective action solutions, resolve capacity challenges requiring transnational collaboration and assistance, as well as provide communities, epistemic actors and NGOs with a stronger voice when applying their own pressure on states parties.[192] Unfortunately, no form of implementation review was included in the UNESCO Convention, and states parties have been left to implement (or *not* implement) their commitments under the UNESCO Convention according to their own preferences or capacities.[193] NGOs and non-state actors should also therefore expand their role in analysing areas for concern in terms of non-compliance and effort should be made to mobilise assistance and multi-sectoral collaboration from global civil society towards addressing such compliance weaknesses, in lieu of state action. Fortunately, given the global governance context in which we find ourselves, there seems to be 'clear evidence of *increasing* involvement' of non-state actors and NGOs in protecting UCH at the global level.[194] This should continue to be encouraged and facilitated, as well as forming a suitable topic for future academic research and analysis.

3. Conclusion: A Global Approach to Protecting Underwater Cultural Heritage

This chapter has explored a number of key theories and concepts forming part of the hypothesis explored across Chapters 6 to 9, including transnational governance, integrated ocean management and multi-level governance. It introduced the primary

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[190] Victor, D.G., Raustiala, K. and Skolnikoff, E.B. (Eds.), (1998), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, MIT Press (Cambridge, MA); Raustiala, K., (2001), *Reporting and Review Institutions in 10 Selected Multilateral Environmental Agreements*, United Nations Environment Programme (Nairobi).

[191] Klabbers, J., (2008), 'Compliance Procedures', in *The Oxford Handbook on International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 995-1009, Oxford University Press (Oxford), at p. 996.

[192] See generally, Beyerlin, U., Stoll, P. and Wolfrum, R. (Eds.), (2006), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia*, Brill (Leiden); Supra n. 87, Zürn, at p. 733; Ibid, Klabbers.

[193] Supra n. 189; Supra n. 166, MacKintosh.

[194] Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261, at p. 240 (emphasis added).

research hypothesis of this study, which is whether a multi-level (global-regional-national-local) governance approach could improve the protection of UCH across the world by particularly addressing, complementing or superseding the weaknesses of the international legal system. It has demonstrated that the many social scientific and policy research fields are all searching for very similar solutions to common problems, such as global public goods, global constitutionalism, transnational law and governance, integrated ocean management, multi-level governance, and global governance. In many senses, therefore, the search for an integrated approach to ocean governance should be recognised as closely interlinked with the search for transnational approaches to governance which, itself, is closely interlinked with taking a multiple-level and multiple-stakeholder approach.

The chapter thus began discussions – no doubt forming the subject of future academic discourse – on the types of norms, systems and organisations which should be facilitated at the global governance level in order to address the issues of cooperation and compliance which were explored in Chapters 3 to 5. This includes the growing need for greater policy leadership and enforcement, for example, through NGOs, epistemic actors, soft law, transnational standardisation, and supranational courts and legal systems. Indeed, while more could possibly be said on the global level, there are two reasons why the chapter has been limited to basic proposals. First, given the collective action challenges of producing effective systems and rules at the global level for global public goods, there is a considerable dearth of such systems and rules. As such, the analysis here has only been able to demonstrate very basic and nascent examples of potential transnationalisation or NGO involvement at the global level, rather than having the opportunity to map out details of a 'thick' multiple-stakeholder regime at this level. The second reason is that, because of the collective action challenges of organising communities and legal systems across the entire world towards global goods, there is an argument that the thickening of regimes immediately *above* or *below* the nation state – at the regional or local community level – is a more realistic target in the interim.

Indeed, as Chapters 7 and 9 show, the regional and community governance levels provide far more comprehensive examples of increasing supranationalisation, transnationalisation and decentralisation in the context of UCH protection. As such, while global constitutionalism or supranationalism appears some way off, the *regional* and *community* levels could provide a more suitable area on which to focus political resources and

academic analysis in the immediate future. However, this is not to downplay the *need* for more intensive stakeholderisation of governance at the global level, which carries numerous advantages as evidenced above. Such stakeholderisation can provide the frame in which supranational and non-state actors and communities can steer the agenda, make rules, implement and enforce rules, and evaluate and monitor the governance system's performance. As this chapter has shown at various junctures, this helps to quell weaknesses in the international legal system by wresting responsibility from states and driving forward enhancements in the transnational governance system. However, it is at the regional level and community level where detailed supranationalisation and stakeholderisation appears most intensively and, in the immediate future, most plausibly. These are therefore examined in much further detail in Chapters 7 and 9.

Chapter 7

A Regional Governance Approach to the Protection of Underwater Cultural Heritage

Chapter Abstract:

This chapter explores the need for regional-level governance in the protection of underwater cultural heritage (UCH). It points to a surprising lack of existing research and literature highlighting the various benefits and strengths to be gained by cooperation across the regional level, such as across continental spaces or shared sea basins. Introducing three main types of regional-level governance – being multilateral, supranational and transnational – it explains how each system of regional-level governance can address the collective action weaknesses identified in Chapters 3 to 5. It also shows that each carry distinct merits and are advantageous in different circumstances, such as: the sovereignty-inspiring nature of multilateralism; the sovereignty-constraining potential of supranationalism; and the sovereignty-evading powers of transnationalism. It then takes this forward and introduces empirical research and secondary literature to the question of whether regional-level cooperation and integration could assist in the protection of UCH. Here, by the use of new empirical evidence (from interview responses), as well as deriving broader views from across the academic literature, it demonstrates that UCH would be better served by an increased focus on the power, efficiency and influence of regional governance regimes and solutions. Despite this, activity in this regard has been remarkably languid, with many academics up to now denying that there is even any need for regional-level solutions to UCH protection. It concludes that further regional solutions need to be explored.

1. Introduction: Three Types of Regional Governance

This chapter argues that the 'regional' level forms a fundamentally vital component of any effective model of marine or environmental governance. Nevertheless, it is an area which has thus far – and with little justification – been unfortunately neglected in the context of UCH protection. This is regrettable considering that it was made clear, both within Article 6 of the UNESCO 2001 Convention on the Protection of the Underwater

Cultural Heritage (UNESCO Convention)[1] and Article 303(4) of the UN Convention on the Law of the Sea (LOSC),[2] that states should be committed to exploring further regional solutions beyond these international-level treaties. Notably, it is also despite the fact that most comprehensive studies on the achievement of effective environmental management, particularly in a transnational environment such as the marine ocean space, highlight the critical necessity of regional-level institutions and processes. Indeed, in the marine environment, the effectiveness of regional-level governance was more formally recognised during the 1970s as part of the post-Stockholm Declaration global environmental movement. For example, the 'Regional Seas Programme' (RSP) established under the United Nations Environment Programme (UNEP) in 1974, led to the establishment of a number of regional seas instruments across various worldwide regions throughout the 1970s and 1980s.[3] The RSP also joined up with a number of existing regional treaties and organisations which had already begun establishing their own regional system, such as OSPAR in the North-East Atlantic and HELCOM in the Baltic.[4]

In addition to the UNEP programme, which emphasised inter-state cooperation and coordination on marine environmental protection, it was also around this time that greater focus was placed on the significant potential of regional approaches to fisheries management.[5] This led to the establishment of numerous Regional Fisheries Management Organisations around the world which cover a variety of zones and species.[6] This time also saw the development of advanced port state controls which were achieved by utilising regional-level approaches, such as by the Paris MOU, which then inspired the creation of similar port state measures across other key regions.[7] In addition, academic

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.
[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.
[3] Rochette, J., Bille, R., Molenaar, E. J., Drankier, P. and Chabason, L., (2015), 'Regional Oceans Governance Mechanisms: A Review', 60 *Marine Policy* 9-19, at p. 10; Oral, N., (2015), 'Forty Years of the UNEP Regional Seas Programme: From Past to Future', in *Research Handbook on International Marine Environmental Law*, R. Rayfuse (Ed.), 339-362, Edward Elgar (Cheltenham); Vallega, A., (1994), 'The Regional Scale of Ocean Management and Marine Region Building', 24(1) *Ocean & Coastal Management* 17-37.
[4] Convention for the Protection of the Marine Environment of the North-East Atlantic, (adopted 22 September 1992 (Paris), in force 25 March 1998), 2354 UNTS 67 (OSPAR Convention); Convention on the Protection of the Marine Environment of the Baltic Sea Area, (9 April 1992 (Helsinki), in force 17 January 2000), 1507 UNTS 167 (Helsinki Convention).
[5] Supra n. 3.
[6] See list of RFMOs at: European Commission, 'Regional Fisheries Management Organisations (RFMOs)', (at: https://ec.europa.eu/fisheries/cfp/international/rfmo_en, accessed: 1 March 2019).
[7] Paris Memorandum of Understanding on Port State Control, (recent amendment adopted 11 May 2018), (at: https://www.parismou.org/system/files/Paris%20MoU%2C%20including%2041st%20amendment.

research in the ocean governance field is commonly disaggregated into the study of different regional and subregional contexts, such as within enclosed or semi-enclosed sea basins or across wider continental stretches.[8] Such regional governance can be comprised of a number of different actors, rules and systems and, depending on the particular object, it is possible to find a vast number of overlapping, interlinked and complementary regulatory regimes. In the main, however, there are perhaps three key forms of regionalisation: multilateral, supranational, and pluralistic regionalisation.[9]

First, *multilateral* regionalisation refers to the development of intergovernmental treaties and agreements between neighbour states across a regional context. Such intra-continental agreements can cover various topics, including trade, security, cross-border enforcement, environmental protection, and the cross-border movement of goods, people and services. An example which has been noted in the context of UCH protection would be the Council of Europe's Convention for the Protection of the Archaeological Heritage of Europe (Valletta Convention).[10] Such intergovernmental regional agreements also range from mere Memoranda of Understanding, with little in the way of directly applicable law;[11] right up to the development of substantive treaty rights and obligations enforceable through international enforcement machinery.[12] This is the traditional form of regional governance which is found more commonly in regions around the world. In the North-East Atlantic, for example, the OSPAR Convention and the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries are examples of such regional-level multilateral arrangements.[13]

pdf; accessed 1 March 2019); McDorman, T.L., (2000), 'Regional Port State Control Agreements: Some Issues of International Law', 5(2) *Ocean and Coastal Law Journal* 207-226, at pp. 208-209.

[8] Alexander, L.M., (1974), 'Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas', 2(2) *Ocean Development & International Law* 151-186. For example, research into marine governance of Europe often divides it up into areas of macro-regional focus, such as the Arctic Ocean, North-East Atlantic, North Sea, Baltic Sea, Mediterranean, and Black Sea.

[9] van Tatenhove, J.P., (2015), 'Marine Governance: Institutional Capacity-Building in a Multi-Level Governance Setting', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 35-52, Routledge (Abingdon), at pp. 37-38.

[10] European Convention on the Protection of the Archaeological Heritage (Revised), (adopted 16 January 1992 (Valletta), in force 25 May 1995), Council of Europe, ETS No. 143.

[11] E.g., Memorandum of Understanding for the Transport of Packaged Dangerous Goods on Ro-Ro Ships in the Baltic Sea (1 January 2018, Copenhagen); Supra n. 7, Paris MOU.

[12] See, e.g., Council of Europe, 'Complete List of the Council of Europe's Treaties', (at: https://www.coe.int/en/web/conventions/full-list; accessed: 1 March 2019).

[13] Supra n. 4, OSPAR Convention; Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (NEAFC), (adopted 18 November 1980 (London), in force 17 March 1982), OJIL L227 (1981) 22.

The second manifestation of regional governance is the elaboration of more detailed *supranational* rule systems, perhaps best typified by the European Union or the European Court of Human Rights (ECHR).[14] Such supranational law is, in many respects, a form of traditional intergovernmental law, but which has gone further in its capacity to constrain unilateral decision-making by nation states or to reach beyond their internal sovereign independence in certain areas.[15] For example, the ECHR can deliver judgments which are directly enforceable in most countries signed up to the Convention.[16] In the EU, for example, the development of directly enforceable law and the appointment of the Court of Justice of the European Union as the supreme court of law within all member states (for matters relating to EU law), ensures that regulations and rules developed through the EU's architecture are truly enforced and harmonised across states.[17] The high level of resource pooling, harmonisation, collective gains, and integrated budgetary commitments also reduces transaction costs and ensures that states cannot free ride by rejecting community-wide commitments.[18] Supranationalism is therefore more effective than intergovernmentalism in its capacity to overcome the weaknesses of consent-based international law examined in Chapters 3 to 5. Naturally, however, achieving such sovereignty-constraining levels of cooperation is not politically frictionless and, in the case of the EU, can take decades of gradual integration and trust building among friendly nations. Neither are such supranational systems fully insulated against being undermined by poor compliance or even from being subsequently withdrawn from by attempting to take governance 'back' toward exclusive national sovereignty.[19]

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[14] Stone Sweet, A. and Sandholtz, W., (1998), 'Integration, Supranational Governance, and the Institutionalization of the European Polity', in *European Integration and Supranational Governance*, W. Sandholtz and A. Stone Sweet (Eds.), 1-26, Oxford University Press (Oxford); Martinico G. and Pollicino, O., (2012), *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar (Cheltenham).

[15] Schermers, H.G. and Blokker, N.M., (2011), *International Institutional Law: Unity Within Diversity*, 5th Edn, Brill (Leiden), at pp. 56-57; De Baere, G., Chané A. and Wouters, J., (2017), 'The Contribution of International and Supranational Courts to the Rule of Law: A Framework for Analysis', in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, A. Jakab and D. Kochenov (Eds.), 19-81, Oxford University Press (Oxford), at pp. 32-36.

[16] Keller, H. and Stone Sweet, A., (2008), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford University Press (Oxford).

[17] Stone Sweet, A., (2011), 'The European Court of Justice', in *The Evolution of EU Law*, P. Craig and G. de Búrc (Eds.), 121-154, Oxford University Press (Oxford).

[18] Levy, R.E., (2017), 'The Law and Economics of Supranationalism: The European Union and the Subsidiarity Principle in Collective Action Perspective', 43(4) *European Journal of Law and Economics* 441-473; Aspinwall, M. and Greenwood, M., (1997), *Collective Action in the European Union: Interests and the New Politics of Associability*, Routledge (Abingdon).

[19] Jakab, A. and Kochenov, D. (Eds.), (2016), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press (Oxford); Falkner, G., Hartlapp, M., Leiber, S. and Treib, O., (2004), 'Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?', 27(3) *West European Politics* 452-473; Martill, B. and Staiger, U. (Eds.), (2018), *Brexit and Beyond: Rethinking the Futures of Europe*, UCL Press (London).

Finally, it is worth acknowledging that regional governance can occur outside of traditional inter-state legal processes, through self-coordination of non-state actors and by increasing public-private integration through *pluralistic*, or transnational, regional governance. Here, the interaction of non-state actors can over time lead to the establishment of non-state law and systems of internal observance and enforcement of norms among communities, or can lead to networks which engage in policy research and development. Such transnational networks can naturally occur across 'regional' contexts and could also be enhanced or hastened through facilitative processes, transboundary legal obligations, or funding, which have arisen by regional intergovernmentalism or supranationalism.[20] They can also occur as 'administrative networks' around common policy objectives.[21] Various examples of non-state actor networks across regional contexts are not difficult to find.[22] Given their organic and sometimes informal nature, such transnational policy networks are capable of possessing less internal legal normativity than traditional supranational or intergovernmental law.[23] However, they still provide additional behavioural modification among regional actors and can assist in advancing subsequent regional law by increased collective trust and goodwill, as well as by bottom-up regulatory forces. Similarly, through supranational forms of regionalisation, it is possible to directly empower non-state actors through directly applicable laws and wider accountability mechanisms.[24]

[20] Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at p. 154.
[21] Mastenbroek, E. and Martinsen, D.S., (2017), 'Filling the gap in the European Administrative Space: The Role of Administrative Networks in EU Implementation and Enforcement', 25(3) *Journal of European Public Policy* 422-435; Klaster, E., Wilderom, C.P.M. and Muntslag, D.R., (2017), 'Balancing Relations and Results in Regional Networks of Public-Policy Implementation', 27(4) *Journal of Public Administration Research and Theory* 676-691.
[22] For example, again in the European context, networked cooperation among non-state actors can be found in organisations such as Eurocean (at: http://www.eurocean.org; accessed 1 March 2019), the Celtic Seas Partnership (at: http://www.celticseaspartnership.eu; accessed 1 March 2019), Association of European Renewable Energy Research Centres (at: http://www.eurec.be/en/; accessed 1 March 2019), European Environment and Sustainable Development Advisory Councils (at: http://eeac.eu; accessed 1 March 2019), European Network of Environmental Professionals (at: http://www.efaep.org; accessed 1 March 2019), and the European Association of Archaeologists (at: http://www.e-a-a.org; accessed 1 March 2019); European Maritime Law Organisation (at: http://www.emlo.org; accessed 1 March 2019).
[23] Berman, P.S., (2007), 'Global Legal Pluralism', 80(6) *Southern California Law Review* 1155-1238; Tamanaha, B.Z., (2008), 'Understanding Legal Pluralism: Past to Present, Local to Global', 30(3) *Sydney Law Review* 375-411, at pp. 401-42; Shaffer, G.C. and Pollack, M.A., (2009), 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', 94(3) *Minnesota Law Review* 706-799, at p. 724.
[24] Rumsford, C., (2011), 'Transnationalism and the Political Sociology of European Transformation: Bringing People Back In', in *Transnational Europe: Promise, Paradox, Limits*, J. DeBardeleben and A. Hurrelmann (Eds.), 37-56, Palgrave Macmillan (London).

All of these forms of 'regionalisation' provide various benefits and drawbacks, depending on the particular regional or global good which is the focus of regulation. The following chapter therefore examines some of these various benefits and possible weaknesses of regional level governance in the context of UCH protection. It demonstrates that, while regional level governance shows considerable promise and potential value in resolving a great deal of challenges facing the protection of UCH, there remain a surprising number of policy experts in the UCH preservation community who have yet to be convinced of its necessity. Through reliance on responses from interviews with experts and secondary evidence, the chapter in fact demonstrates that regional-level policies – of all types and sizes – should be pursued in earnest and at the earliest opportunity, if UCH is ever to be protected effectively.

2. Addressing Weaknesses in International Law through Regional Governance

Looking at the performance of regional-level systems in the ocean environment thus far, there seems little doubt that regionalism has the potential to produce a more efficient, effective and integrated system of ocean governance.[25] Nevertheless, remarkably, while there is an increasing amount of detailed descriptive literature on the processes and drivers of regionalisation in ocean management,[26] it is curiously rare to find expositions on precisely *why* we need regional-level ocean governance and the advantages of divesting national political and economic resources towards this end. As Cook and Sachs once put it, the capacity of regional level approaches to provide global public goods is a 'hugely neglected' area of research.[27] The best efforts have usually arisen when focused within specific regional contexts. As one example, in 2016, Egede provided a number of persuasive arguments in favour of unifying resources, institutions and rules across the

[25] Supra n. 3, Rochette et al, at p. 9; van Tatenhove, J.P., (2016), 'The Environmental State at Sea', 25(1) *Environmental Politics* 160-179, at p. 175.

[26] E.g., Alexander, L.M., (1977), 'Regional Arrangements in the Oceans', 71(1) *American Journal of International Law* 84-109; Supra n. 3, Vallega; Vallega, A., (2002), 'The Regional Approach to the Ocean, the Ocean Regions, and Ocean Regionalisation – A Post-Modern Dilemma', 45(11-12) *Ocean and Coastal Management* 721–760; Raakjaer, J. and van Tatenhove, J.P., (Eds.), (2014), 'Marine Governance of European Seas', 50 (Part B) *Marine Policy* 323-382 (Special Issue of Marine Policy, 2014); Soma, K., van Tatenhove, J. and van Leeuwen, J., (Eds.), (2015), 'Marine Governance in European Seas: Processes and Structures of Regionalization', 117 *Ocean and Coastal Management* 1-74 (Special Issue of Ocean and Coastal Management, 2015); Gilek, M. and Kern, K., (Eds.), (2015), *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, Routledge (Abingdon).

[27] Cook, L.D. and Sachs, J., (1999), 'Regional Public Goods in International Assistance', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 436-449, Oxford University Press (Oxford), at p. 437.

African Union, as opposed to adopting an Integrated Maritime strategy which keeps efforts only at the inter-national level.[28]

Given this dearth of research looking at the need for and benefits of regional-level integration, some of its core advantages are compiled or proposed here:

- Avoiding races-to-the-bottom: Famously first argued in favour of federalising corporate taxation laws in the US, the economic concept of the 'race to the bottom' provides that regulatory decentralisation can lead to harmful competition effects between jurisdictions who are continuously focused on attracting economic activity.[29] By tying national policies together across a region, it therefore prevents harmful races to the bottom of environmental, taxation, consumer, employment and other public good standards.[30] While some studies have disputed the empirical realities of the 'race to the bottom', by suggesting that regulatory competition can drive up standards in a 'race to the top', the evidence shows that various factors can indeed create conditions for races to the bottom, particularly with regard to public goods that produce externalities.[31] For certain, the capacity to improve public standards by regional harmonisation has been evidenced by the globally pioneering environmental standards achieved across the EU framework.[32]

- Foreclosing space to free riders: Regional spaces can be more easily enclosed or managed in a way which controls access for non-regional actors or free riders.[33] Between adjacent exclusive economic zones, for example, flag state freedoms are considerably limited by the sovereign rights of coastal states. This ocean space can

[28] Egede, E., (2016), 'Institutional Gaps in the 2050 Africa's Integrated Maritime Strategy', 2016(1) *Journal of Ocean Law and Governance in Africa* 1-27.
[29] Yanblon, C.M., (2006), 'The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910', 32(2) *Journal of Corporation Law* 323-380.
[30] Dunoff, J.L., (2008), 'Levels of Environmental Governance', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 85-106, Oxford University Press (Oxford), at p. 94 and 95.
[31] Holzinger, K. and Knill, C., (2004), 'Competition and Cooperation in Environmental Policy: Individual and Interaction Effects', 24(1) *Journal of Public Policy* 25-47; Holzinger, K. and Sommerer, T., (2011), ''Race to the Bottom' or 'Race to Brussels'? Environmental Competition in Europe', 49(2) *Journal of Common Market Studies* 315-339.
[32] Axelrod, R.S. and Schreurs, M.A., (2014), 'Environmental Policy Making and Global Leadership in the European Union', in *The Global Environment: Institutions, Law, and Policy*, R.S. Axelrod and S. Van Deveer (Eds.), 4th Edn, 157-186, CQ Press (Washington DC).
[33] Molenaar, E.J., (2015), 'Port and Coastal States', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 280-303, Oxford University Press (Oxford), at p. 300; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford), at p. 490.

thus become effectively controlled by neighbouring states who can coordinate in the foreclosure of space to free riders and in the collective raising of standards within the enclosed region.

- Smaller number of states makes collective action easier: As was discussed in Chapter 4, the key means to overcome international cooperation failure is through the use of repeated interactions and the gradual development of group consciousness among actors.[34] Having a smaller collective of states which are seeking this critical mass, each with resources available to offer across the regional marine space, results in a lower threshold to reach and more to gain by collective action and standard raising.[35] A smaller number of states will also make free riding easier to detect.[36]

- Greater interdependence: Regional neighbours often have historic experience in achieving collective action solutions together, including over transboundary issues such as trade, transportation, communication, immigration, customs, and environmental protection.[37] This could lead to numerous benefits, such as technical harmonisation, the removal of cultural, language and practical barriers, as well as a better infrastructure for cross-border enforcement. This close integration and collective cooperation between neighbouring states could also strengthen the motivation to cooperate in the enforcement of collectively negotiated rules, given the stronger threat of countermeasures, trade sanctions, or lost collective gains.[38] Therefore, even in intergovernmental or transnational arrangements which are less co-dependent than supranational regimes, there is a greater capacity for effective enforcement mechanisms than is available at the global level.

[34] See Chapter 4, Section 2. Veld R.J., (2013), 'Transgovernance: The Quest for Governance of Sustainable Development', in *Transgovernance: Advancing Sustainability Governance*, L. Meuleman (Ed.), 275-310, Springer Verlag (Heidelberg), at pp. 280-282.
[35] Rochette, J. and Chabason, L., 'A Regional Approach to Marine Environmental Protection: The "Regional Seas" Experience, in *Oceans: The New Frontier*, P. Jacquet, R.K. Pachauri and L. Tubiana (Eds.), 111-121, The Energy and Resources Institute (New Delhi), at p. 115.
[36] Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford), at p. 55.
[37] Birdsall, N. and Lawrence, R.Z., (1999), 'Deep Integration and Trade Agreements: Good for Developing Countries?', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 128-151, Oxford University Press (Oxford), at p. 146.
[38] Diez, T., Tocci, N., Faleg, G. and Scherwitz, E., (2017), 'Introduction: Promoting Regional Integration and Transforming Conlicts?', in *The EU, Promoting Regional Integration, and Conflict Resolution*, T. Diez and N. Tocci (Eds.), 1-28, Palgrave Macmillan (London), at pp. 5-10; Tallberg, J, (2002), 'Paths to Compliance: Enforcement, Management, and the European Union'. 56(3) *International Organization* 609-643.

- Collective trust and goodwill: States in a regional context, through their shared histories and closer interdependence, often have higher levels of collective trust and goodwill.[39] Similarly, they may share cultural similarities which makes cooperation easier. Under the global public goods analysis in Chapter 4, a key cause of inter-state cooperation failure was a *fear* of being undermined by free riding or recalcitrant states.[40] This improved trust and goodwill not only means that states are more willing to offer resources and engage in extended collaborative efforts, but they can therefore rely on neighbouring states to 'come up with the goods' when called upon.[41] Furthermore, collective trust can be improved as regional states become more open to reciprocally softening political borders and sharing of political space, especially in the use of marine spatial planning, shared marine protected areas, or the co-development of transboundary projects.[42]

- Difficulty externalising harms: Given that much non-cooperation between states results from their ability to simply externalise harms or losses to "outsiders", the shared nature of regional ocean space and the close proximity between neighbouring states makes any attempt to externalise harm more challenging.[43] The high level of ecosystem interconnectivity within shared regional marine spaces means that harms produced by one state will be felt more strongly by neighbouring states.[44] Similarly, the close political and social relationships between neighbouring states means that it is harder to 'switch off' from transboundary harm, especially regarding spillovers of an abstract, psychological, or sociocultural nature, such as environmental and cultural heritage destruction.[45] This sense of 'shared heritage' has thus already been seen as a particularly strong argument in favour of regional treaties protecting the ocean environment.[46]

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[39] Supra n. 30, Dunoff, at p. 87; Supra n. 33, Kaul, Grunberg and Stern, at p. 476.
[40] See Chapter 3; Kaul, I., (2012), 'Global Public Goods: Explaining Their Underprovision', 15(3) *Journal of International Economic Law* 729-750.
[41] Matz-Lück, N. and Fuchs, J., (2014), 'The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?', 49 *Marine Policy* 155-166, at p. 163; Supra n. 37, Birdsall and Lawrence, at p. 146.
[42] Ooms, E., (2018), Interview with Erik Ooms, 27 February 2018, Transcript on File; Jay, S.A. and Toonen, H.M., (2015), 'The Power of the Offshore (Super-) Grid in Advancing Marine Regionalization', 117 *Ocean and Coastal Management* 32-42.
[43] Supra n. 30, Dunoff, at p. 90; Mattli, W., (1999), *The Logic of Regional Integration Europe and Beyond*, Cambridge University Press (Cambridge), at pp. 46-50.
[44] Supra n. 27, Cook and Sachs, at p. 438; Supra n. 33, Molenaar, at p. 300; Supra n. 41, Matz-Lück and Fuchs, at p. 163.
[45] Supra n. 33, Kaul, Grunberg and Stern, at p. 476.
[46] Supra n. 35, Rochette and Chabason, at p. 115; Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention), (adopted 16 February 1976, in force 2 December 1978), 1102 UNTS 27, Preamble; Kuwait Regional Convention for Co-Operation on the Protection of the Marine

- More flexible to regional context: Every regional space is different, with different actors, values, ecosystems, geographies, cultures, resources, and challenges.[47] It therefore makes sense that negotiations over collective action towards *global* goods are fully adaptable to addressing such localised contexts.[48] The centralisation of policymaking also allows for more efficient coordination of effort by disparate environmental groups and campaigners, who can collectivise political pressure upon central decision-makers, enabling them to properly contest multinational economic actors who can easily take advantage of segregated national polities.[49]

- Suitably equipped to manage localised challenges: More practically, it is unsurprising that most of the maritime actors operating in regional spaces are going to be nationals from or vessels registered in nearby states. In this sense, the coastal states within a regional zone will possess the resources required to achieve effective maritime surveillance and enforcement (e.g., localised coast guard and police units, surveillance equipment, proximate public agencies), which can be efficiently pooled.[50] They will also possess the greater number of actors within the region whose operations need regulating or who can themselves assist in the development and enforcement of effective policy.

- Policy innovation and global trendsetting: The smaller and more concentrated collaborative spaces in which regional governance takes place permit a higher level of flexibility, policy innovation and norm entrepreneurship. This can be a source of inspiration for other regional spaces, by illustrating what can be achieved by regional cooperation and how.[51] This partial decentralisation from globalised approaches can

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Environment from Pollution, (adopted 24 April 1978 (Kuwait), in force 1 July 1979), Preamble; Supra n. 27, Cook and Sachs, at p. 438.

[47] Kern, K. and Gilek, M., (2015), 'Governing Europe's Marine Environment: Key Topics and Challenges', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 1-12, Routledge (Abingdon), at p. 3.

[48] Supra n. 35, Rochette and Chabason, at p. 114; Rochette, J., Unger, S., Herr, D., Johnson, D., Nakamura, T., Packeiser, T., Proelss, A., Visbeck, M., Wright, A. and Cebrian, D., (2014), 'The Regional Approach to the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction', 49 *Marine Policy* 109-117, at p. 109; Blasiak, R. and Yagi, N., (2016), 'Shaping an International Agreement on Marine Biodiversity Beyond National Jurisdiction: Lessons From High Seas Fisheries', 71 *Marine Policy* 210-216, at p. 212; Ardron, J., Druel, E., Gjerde, K., Houghton, K., Rochette, J. and Unger, S., (2013), Advancing Governance of the High Seas', 1/2013 *IASS Policy Brief* 1-12, at p. 7; Supra n. 37, Birdsall and Lawrence, at p. 146.

[49] Supra n. 30, Dunoff, at p. 97; Supra n. 41, Matz-Lück and Fuchs, at p. 163.

[50] Supra n. 28, Egede.

[51] Egan, M. (2009) 'Governance and Learning in the Post-Maastricht Era?', 16(8) *Journal of European Public Policy* 1244-1253, at p. 1248; Zito, A. and Schout, A., (2009) 'Learning Theory Reconsidered: EU

also enable national governments to shift the blame for unpopular but necessary policies onto regional organisations, thus increasing the political incentive for national governments to acquiesce in accepting externally devised limitations and obligations.[52] However, there is an inherent risk that too much blame-shifting by national governments on to the regional level can serve to undermine the value and importance of regional governance itself, creating an illusion among national voters of being restricted by an overbearing regional technocracy.

In other words, where there is insufficient global trust and goodwill to commit to resigning sovereign rights where needed in the production of global goods, the use of regional cooperation can provide a vitally effective means to go beyond the global-level framework and, from there, strengthen inter-state commitments and trust.[53] This can often provide more effective protection in lieu of meaningful global commitments and will usually, over time, increase the level of state obligations, trust, interdependence and willingness to be bound on certain 'external' concerns; gradually also strengthening the quality of future agreements at the global level.[54] In the ocean environment, where deep-seated concerns relating to sovereign freedoms and territorial rights have widely hindered effective collective action at the global level, the use of regional-level regulation has thus become an ideal and increasingly touted interim solution to break the impasse with slow or struggling 'inter-national' approaches at the global bargaining table.[55] It is therefore no surprise that a leading monographic exposition of 'integrated' ocean management by Yoshifumi Tanaka viewed such an approach as effectively synonymous with regional-level governance.[56]

Regional governance can therefore be viewed as a conduit for more effective global governance.[57] Travelling from the regional upwards to the global, it is possible that

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Integration Theories and Learning', 16(8) *Journal of European Public Policy* 1103-1123, at p. 1115; Wälti, S., (2010), 'Multi-Level Environmental Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 411-422, Edward Elgar (Cheltenham), at pp. 415-416.

[52] Marks, G., (1999), 'An Actor-Centred Approach to Multilevel Governance', in *The Regional Dimension of the European Union: Towards a 'Third Level' in Europe?*, C. Jeffery (Ed.), 20-40, Routledge (Abingdon), at p. 26; Ibid, Wälti, at p. 415.

[53] Supra n. 33, Kaul, Grunberg and Stern, at p. 476; Supra n. 48, Rochette et al, at p. 109.

[54] Supra n. 35, Rochette and Chabason, at pp. 114 and 119.

[55] Supra n. 33, Molenaar, at p. 300; Hayward, P., (1984), 'Environmental Protection: Regional Approaches', 8(2) *Marine Policy* 106-119.

[56] Tanaka, Y., (2008), *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea*, Routledge (Abingdon).

[57] Thakur, R. and Van Langenhove, L., (2006), 'Enhancing Global Governance Through Regional Integration', 12(3) *Global Governance* 233-240; C.f., Supra n. 27, Cook and Sachs, at pp. 440-441.

successful regional approaches and effective innovation in each region can cross-fertilise to other regions or can provide inspiration for global solutions.[58] While downstream, it is possible for global programmes to allocate governance responsibility for global goods to regional organisations and agencies,[59] and to operate as a facilitator and arbiter between different regional regimes.[60] For example, as Visbeck et al recently said, while regional systems are beneficial 'to field-test different approaches and . . . to take region-specific issues into account . . . they are most effective when embedded in a global framework of goals and targets.'[61] Importantly, they often represent more detailed, substantive and sovereignty-constraining characteristics than global treaties. As such, once states have become familiar with collective action on 'externally valued' issues at the regional level, it is a much smaller step to just agree to transmigrate these values inter-regionally.

A good example in the United Kingdom has been the UNESCO 1970 Convention on the Export and Import of Illicit Cultural Property.[62] This treaty was not ratified by the UK until 2002, 32 years after its signing. However, a key reason for the UK government being motivated to join the treaty was that UK legislation had gradually aligned with the Convention anyway as a result of the EU 1993 Directive on Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, which was first negotiated at the regional level.[63] Many examples can be found of this sequential migration of standards from the regional level to the global. For example, the development of stringent port state measures, now a norm in many regions around the world and the principal means for controlling ports-of-convenience, has been driven at the regional and not global

[58] Supra n. 33, Kaul, Grunberg and Stern, at pp. 466 and 476.
[59] See e.g., European Commission, (1999), *Preparing for Implementation of the Kyoto Protocol*, Commission Communication to the Council and the Parliament, 19 May 1999, COM (1999) 230.
[60] For example, the aforementioned Regional Seas Programme under the UN Environment Programme (supra n. 3).
[61] Visbeck, M., Kronfeld-Goharani, U., Neumann, B., Rickels, W., Schmidt, J., van Doorn, E., Matz-Lück, N. and Proelss, A., (2014), 'A Sustainable Development Goal for the Ocean and Coasts: Global Ocean Challenges Benefit from Regional Initiatives Supporting Globally Coordinated Solutions', 49 *Marine Policy* 87-89, at p. 88.
[62] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (adopted 14 November 1970, in force 24 April 1972), 823 UNTS 231.
[63] UK Foreign and Commonwealth Office, (2002), *Explanatory Memorandum on the Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property*, April 2002, Command Paper Number 5500; Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, 27 March 1993, 74 *Official Journal of the European Union* 74.

level, and led by the Paris MOU between European states in 1982.[64] This is now bolstered at the global level, ex post, with the FAO's Port State Measures Agreement.[65]

Friedheim once stated that '[a]lthough some ocean problems are amenable to a bilateral or regional solution, many are not.'[66] However, he then fails to explain the basis of this conclusion, which appears to have been based on a defensive view of nationalism, rather than any real assessment of regionalism's actual potential for ocean management. In reality, there seems no plausible argument why *most* problems of ocean governance – themselves issues which impact or contain spillovers to communities and future generations outside of the state in question – cannot be effectively resolved by processes of regional integration, built on a practical framework of constitutional subsidiarity. In this sense, the global level only need to be used where it is necessary on account of spillovers from the regional levels, such as specifically addressing the rights of non-regional flag states, facilitating inter-regional cooperation, or driving up the quality of regional regimes.[67] Similarly, it does not lose sight of the importance of autonomy and freedom of communities at the national and subnational level to regulate any matters which carry minimal spillover.

Therefore, most global environmental treaties or conventions relating to global public goods appear to recognise the significant potential of regional-level approaches by usually permitting or even calling for subsequent efforts at regional or bilateral levels to build stricter or more effective and detailed regimes.[68] For example, the LOSC regularly calls for the use of regional organisations and systems to advance protection of the ocean environment,[69] including an acknowledgement that such measures may be taken in the protection of UCH.[70] Indeed, the UNESCO 2001 Convention itself says that states 'are *encouraged* to enter into bilateral, regional or other multilateral agreements or develop

[64] Supra n. 7, Paris MOU.
[65] Food and Agricultural Organization, (2009), Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (adopted 22 November 2009, in force 5 June 2016), (at: http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf; accessed 1 March 2019).
[66] Friedheim, R.L., (1999), 'Ocean Governance at the Millennium; Where We Have Been; Where We Should Go', 42 *Ocean and Coastal Management* 747-765, at p. 748.
[67] '[N]ot every international environmental problem needs to be dealt with on a global level' (Alhéritière, D., (1982), 'Marine Pollution Regulation: Regional Approaches', 6(3) *Marine Policy* 162-174, at p. 172.
[68] Drankier, P., (2008), 'Embedding Maritime Spatial Planning in National Legal Frameworks', 14(1) *Journal of Environmental Policy & Planning* 7-27, at p. 10.
[69] E.g., Supra n. 2, LOSC, Arts. 123 and 197; Barnes, R.A., Freestone, D. and Ong, D.M., (2006), 'The Law of the Sea: Progress and Prospects', in *The Law of the Sea: Progress and Prospects*, D. Freestone, R.A. Barnes and D.M. Ong (Eds.), 1-27, Oxford University Press (Oxford), at p. 6.
[70] Supra n. 2, LOSC, Art. 303(4).

existing agreements' for protecting UCH, and such agreements can 'adopt rules and regulations which would *ensure better protection* of underwater cultural heritage than those adopted in this Convention.'[71] As Aznar said in interview, a 'regional (or sub-regional) approach must be explored, including all stakeholders' and the '2001 Convention fosters this in its Article 6.'[72]

As Tulio Scovazzi, renowned Professor of International Law, also writes of this provision within the UNESCO Convention:

> '[It] opens the way to multiple-level protection of underwater cultural heritage. This corresponds to what has already happened in the field of the protection of the natural environment, where treaties having a world sphere of application are often followed by treaties concluded at regional and subregional levels. The key to coordination among treaties applicable at different levels is the criterium of the better protection, in the sense that the regional and subregional treaties are concluded to ensure better protection granted by those adopted at a more general level.'[73]

3. Regional Governance and Underwater Cultural Heritage Protection

(a) Existing Regional Regimes

Despite agreement within both the LOSC and UNESCO Convention that regimes should be developed at the regional level which go beyond those achieved at the international table, as well as increasingly harmonised opinion that such regional and subregional approaches are needed to address shared environmental challenges, developments in this regard with respect to UCH have been disconcertingly languid. As Williams said in interview, 'there was tremendous scope for regional agreements [but] I can't name one'.[74] He continues, saying that the UNESCO Convention 'was meant to work on a cooperative

[71] Supra n. 1, UNESCO Convention, Art. 6(1); DeRudder, T. and Maes, F. (Eds.), (2015), *Workshop: The Legal Protection of Underwater Cultural Heritage 23 April 2015 – Final Report*, Maritime Institute, University of Ghent (Ghent), (at: http://www.vliz.be/imisdocs/publications/ocrd/274121.pdf; accessed 8 January 2019), at p. 14 (per Varmer).
[72] Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File.
[73] Scovazzi, T., (2006), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at p. 291.
[74] Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File; 'There are no existing examples of general multilateral agreements other than the Underwater Convention.' (O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at p. 54).

basis. Well, if you haven't got regional agreements, I don't think you are cooperating.'[75] It only appears to be the development of *bilateral* state-to-state agreements where most UCH-related inter-national norm-building has been achieved.[76] As Firth has said, however, such bilateral agreements are only relevant to 'specific instances'; or, in other words, specific wrecks of considerable interest to a flag state where – as was explained in Chapter 4 – there is sufficient political motivation to arrange a specific partnership with the coastal state regarding a *known wreck* of specific political or economic *significance*.[77]

However, in terms of detailed regional regimes specifically addressing the in situ protection of UCH – whether multilateral, supranational, or transnational – progress has been poor. For example, even though European nations can often regard themselves as leading in the field of archaeological site management, there are no substantive regimes for the protection of UCH across any of Europe's main regional seas.[78] As was noted in Chapter 1, efforts to draft an inter-state treaty on the protection of UCH failed at the European level in 1985, given disagreements over the allocation of jurisdiction.[79] However, much has changed since this negotiating effort which was undertaken over three decades ago. The approach of states could be considerably different in the modern-day era and, given greater awareness of the plight of marine heritage, could pay far less attention to questions of maritime jurisdiction and creeping coastal state rights; and far more fruitful attention, instead, to expanding on detailed rules for integrated approaches, regulatory harmonisation, resource pooling, and achieving meaningful systems of cooperation and coordination between states, agencies and private operators. As Risvas said in 2013, '[a]lthough an attempt to develop a European convention on UCH failed during the 1980s, it seems that regionalism is regaining its momentum.'[80]

It is true that the Council of Europe's Valletta Convention and Landscape Convention have played a key role in driving up the quality of archaeological site management and protection across Europe.[81] However, as noted previously, neither apply beyond

[75] Ibid, Williams.
[76] See Chapter 4, Section 3(c); Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File.
[77] See Chapter 4, Section 3(c).
[78] Altvater, S., (2018), Interview with Susanne Altvater, 17 May 2018, Transcript on File.
[79] See Chapter 1, Section 4. Supra n. 74, O'Keefe, at pp. 53-54.
[80] Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590, at p. 587.
[81] European Convention on the Protection of the Archaeological Heritage (Revised), (adopted 16 January 1992 (Valletta), in force 25 May 1995), Council of Europe, ETS No. 143; European Landscape Convention (adopted 20 October 2000, in force 1 March 2004), Council of Europe, ETS No. 176; 'I mean you can look

territorial waters.[82] Nor do they provide a great deal of pressure on states to curtail their economic expansion while preserving sites for the benefits of others. Furthermore, their emphasis is more on archaeological standards, as opposed to developing specific and detailed rules of cross-border integration and more effective systems of collective governance. However, progress in the development of regional regimes for marine environmental protection, security and surveillance cooperation, port state controls, and marine planning, could deliver numerous incidental protections for UCH. This includes agreements on the establishment of marine protected areas, such as the 1995 Protocol to the Barcelona Convention (protecting the Mediterranean)[83] which allows states parties to establish 'Specially Protected Areas of Mediterranean Importance' (SPAMIs), with the ability to include sites based on their cultural importance.[84] However, despite Aznar's view that this provides a potential pathway towards the protection of UCH, it has yet to be utilised in any manner at all for such a purpose.[85] Furthermore, even if it was being used, the same issues with bilateral cooperation over specific wrecks are likely to apply, in that this mechanism's focus on superlative significance is likely to only suit *well-known* (underwater) landmarks, where there is sufficient *political and economic incentive* to divert national resources and political energy towards their protection.[86]

As is explored again in subsection (iii) below, because of the closer interdependence and collective sense of shared heritage, political action and meaningful progress towards UCH protection has been perhaps best witnessed in regional sea basins or semi-enclosed seas. For example, in addition to the development of the SPAMI Protocol to the Barcelona Convention, states in the Mediterranean have agreed rules for protecting UCH within the Integrated Coastal Zone Management Protocol.[87] Similarly, a conference between

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at things that aren't always necessarily focused on underwater cultural heritage. For Europe, you have the Valletta Convention. That has already filled in gaps.' (Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File).

[82] Ibid, Valletta Convention, Art. 1(2)(ii); Ibid, European Landscape Convention, Art. 2.

[83] Protocol concerning specially protected areas and biological diversity in the Mediterranean, (adopted 14 December 1999, under the Barcelona Convention (supra n. 46), as amended 10 June 1995), 322 *Official Journal of the European Communities* 3-17.

[84] Ibid, Protocol concerning specially protected areas and biological diversity in the Mediterranean, Art. 4(d).

[85] Aznar, M.J., (2006), 'Spain', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 271-296, Martinus Nijhoff (Leiden), at p. 293; Supra n. 71, DeRudder and Maes, at p. 14.

[86] As Aznar noted in interview, '[i]t is not the perfect solution [to achieving a more regionally integrated approach], but I think it is one of the proposed solutions.' (Supra n. 72, Aznar).

[87] Protocol on Integrated Coastal Zone Management in the Mediterranean, (adopted 21 January 2008, under the Barcelona Convention (supra n. 46), as amended 10 June 1995), 34 *Official Journal of the European Communities* 19-28; Firth, A., (2013), 'Marine Spatial Planning and the Historic Environment', Report for English Heritage, Project Number 5460, Fjordr Ref: 16030, Fjordr (Tisbury), at pp. 45-46.

Mediterranean states in Siracusa in March 2001, led to the *Siracusa Declaration on the Submarine Cultural Heritage of the Mediterranean Sea* calling for a mutual respect for shared submerged cultural heritage of the Mediterranean sea basin and to explore future options for cooperation and bilateral and regional agreements.[88] Two years later saw another international conference in Siracusa in 2003 which explored further options for cooperation, at which Italy proposed a draft multilateral convention for Mediterranean states.[89] However, it appears not to have gone any further than this.

Similarly, the Baltic Sea is often heralded as a leading sub-region for UCH protection, largely assisted by overarching coordination of the HELCOM Secretariat which is an effective intergovernmental commission for coordinating marine environmental protection efforts across the Baltic Sea.[90] This has led to numerous initiatives and working groups over the years with a focus on coordinating inter-state activity towards heritage protection, such as the Baltic Sea Heritage Co-Operation initiative,[91] the Baltic Region Heritage Committee,[92] the Code of Good Practice for the Management of the Underwater Cultural Heritage in the Baltic Sea Region,[93] and numerous marine spatial planning (MSP) pilots and working groups which have included UCH to varying extents.[94] The most relevant MSP initiative is the BalticRIM project, funded by the EU and running between 2017-2020, which is presently exploring the means to more

[88] Scovazzi, T., (2009), 'The Protection of Underwater Cultural Heritage: An Italian Perspective', in *The Illicit Traffic of Cultural Property in the Mediterranean*, A.F. Vrdoljak and F. Francioni (Eds.), EUI Working Papers, AEL 2009/9, 75-88, Academy of European Law (Trier), at pp. 85-86; Strecker, A., (2009), 'Pirates of the Mediterranean? The Case of the 'Black Swan' and its Implications for the Protection of Underwater Cultural Heritage in the Mediterranean Region', in *The Illicit Traffic of Cultural Property in the Mediterranean*, A.F. Vrdoljak and F. Francioni (Eds.), EUI Working Papers, AEL 2009/9, 59-74, Academy of European Law (Trier), at p. 70.

[89] Ibid.

[90] Convention on the Protection of the Marine Environment of the Baltic Sea Area, (adopted 9 April 1992 (Helsinki), in force 17 January 2000), 1507 UNTS 167; Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File; Supra n. 42, Ooms; Supra n. 78, Altvater.

[91] Dromgoole, S., (2006), 'Editor's Introduction', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), xxvii-xxxviii, Martinus Nijhoff (Leiden), at p. xxxvi; Matikka, M., (2006), 'Finland', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 43-57, Martinus Nijhoff (Leiden), at p. 56; Adlercreutz, T., (2006), 'Sweden', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 297-312, Martinus Nijhoff (Leiden), at p. 311.

[92] Baltic Region Heritage Committee, (at: http://baltic-heritage.eu; accessed 1 May 2019); Council of the Baltic Sea States, 'Baltic Region Heritage Committee', (at: http://www.cbss.org/regional-identity/cultural-heritage/; accessed 1 May 2019).

[93] Monitoring Group on Cultural Heritage in Baltic Sea States, (2008), *The Code of Good Practice for the Management of the Underwater Cultural Heritage in the Baltic Sea Region (COPUCH)*, 10 March 2008, H. Edgren and B. Varenius (Eds.), (at: http://mg.kpd.lt/LT/7/UNDERWATER-HERITAGE.htm; accessed 1 May 2019).

[94] See European MSP Platform, 'Baltic Sea', (at: https://www.msp-platform.eu/sea-basins/baltic-sea-0; accessed 1 May 2019).

effectively integrate marine cultural heritage within broader MSP efforts across the Baltic Sea.

As with the Mediterranean, the Baltic Sea also tried and failed to complete a new draft regional agreement around the time that the UNESCO Convention was concluded.[95] As argued below, however, it has largely been on account of an erroneous view that a regional agreement will *replace* the UNESCO Convention; whereas, in fact, the UNESCO Convention works well as both a parallel complement and precursor to effective regional regimes. Finally, there are other regions which have made some motions towards better regional coordination. Two such regions, which are often touted as areas with great potential for more effective regionalism on UCH protection, are across Latin America and the Caribbean.[96] Here, for example, UNESCO has played an active role in coordinating intergovernmental meetings between regional states who are, in many cases, already party to the UNESCO Convention.[97] However, detailed schemes of cooperation are still some way off. Finally, as explored below, Williams once noted a discussion raised by some Northern European state delegates, back in 2006, regarding a new agreement specifically aimed at the wrecks of the Battle of Jutland, which could eventually expand out to the whole North Sea.[98] Although, again, this does not appear to have reached a sufficient critical mass of political interest among budget-constrained and time-limited governments.

(b) The Need for More and Better Regional Regimes

Despite this lack of effort, there is a growing view among most in the archaeological and marine environmental community that regional agreements could provide the key to enhancing the protection of UCH beyond the struggling international efforts so far. Remarkably, however, this view is not everywhere subscribed. For example, Williams noted how there are several leading policy advocates in the field of UCH who are set against the idea of the United Kingdom joining a regional regime on UCH protection,

[95] Supra n. 91, Matikka, at p. 56.
[96] Supra n. 90, Maarleveld; Supra n. 74, Williams.
[97] UNESCO UCH Secretariat, (2013), 'Ministerial Meeting on the Protection of the Underwater Cultural Heritage in Latin America and the Caribbean', (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/worldwide-old/latin-america-and-the-caribbean/lima-ministerial-meeting/; accessed 1 May 2019); Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261, at p. 239.
[98] González, A. W., O'Keefe, P. and Williams, M., (2009), 'The UNESCO Convention on the Protection of the Underwater Cultural Heritage: A Future for Our Past?', 11(1) *Conservation and Management of Archaeological Sites* 54-69, at p. 64.

fearing that it would seriously undermine the case for ratification of the UNESCO 2001 Convention.[99] This is despite the fact that, as was demonstrated above in the context of the UNESCO 1970 Convention on Cultural Property, regional regimes can be a highly effective way to align standards and thereby set the path towards ratification and harmonisation of a global multilateral regime. As Williams said, there is an argument that once signed up to a regional agreement you could ask, 'why not just sign up to the UNESCO Convention' at that point?[100] He then equated regional agreements, in many senses, to a "Try Before You Buy" scheme wherein states can test the water on stricter terms, before growing outwards to a larger scale.[101] He further discussed how the political context of UCH in Europe would likely suit a regional approach first, before truly committing to the global level; whereas, by contrast, the political context of UCH in Latin America has made it more suited to securing the global approach first, before then exploring regional approaches.[102]

However, while these views accord well with the literature review conducted above and with wider evidence of such approaches being effective in the natural environmental context, it is not a view which is shared among all in the UCH community. As Guérin said in interview, 'in the end, underwater archaeology is quite a small world so most people – well certainly underwater archaeologists – say but we have the 2001 Convention, why would you need anything else?'[103] She instead stressed the importance of ensuring that states sign up to the UNESCO Convention, rather than engage in distracting efforts at regional integration which would be 'counter-productive'.[104] She felt that the *Titanic* and *Estonia* wrecks were exceptional cases, as would be any World War II wrecks, given that they were not covered by the 100-year age definition of UCH in the Convention; but, otherwise, it is not helpful to distract away from the UNESCO Convention.[105]

O'Keefe makes a similar point, writing in 2014 that there 'would not seem to be any point in attempting to negotiate another such general agreement in the near future', excepting special wreck sites, or countries who may see the advantage of leading a multilateral agreement specifically around the protection of their own UCH, such as Spain and

[99] Supra n. 74, Williams.
[100] Supra n. 74, Williams.
[101] Supra n. 74, Williams.
[102] Supra n. 74, Williams.
[103] Supra n. 81, Guérin.
[104] Supra n. 81, Guérin.
[105] Supra n. 81, Guérin.

China.[106] It is perhaps understandable that there is concern among the UCH community that regional multilateral conventions might only undermine, rather than support, the UNESCO Convention, given the track record of the 1985 Draft European Convention and other efforts. For example, the 2003 draft Agreement on the Protection of the Underwater Cultural Heritage in the Mediterranean Sea proposed by Italy was clearly intended to offer an alternative to the UNESCO Convention and introduce clauses which ameliorate the concerns of states with the UNESCO Convention.[107]

Guérin goes further and suggests that the transnationality of UCH is an argument against such regional approaches, given that such approaches cannot deal with third states outside the region who are visiting or have links to UCH within the region.[108] For example, she refers to the *Titanic Agreement* and *Estonia Agreement* which have struggled to curtail free riders.[109] In a similar vein, Risvas warns that regional approaches 'will not lead overnight to the creation of a comprehensive and generally accepted legal framework, since cooperation obligations contained therein will bind only state parties.'[110] Adlercreutz more firmly rejected regional governance when he said that anybody who promotes the idea of regional cooperation for UCH protection 'must be oblivious to the non-effectiveness of regional agreements on maritime law, amply demonstrated in the agreement between Estonia, Finland and Sweden [protecting the M/S *Estonia*]. This treaty has not prevented German and US nationals from extensive diving and filming on the wreck.'[111] This is similar to O'Keefe, who said that regional treaties:

> 'will have a limited effect albeit at the expense of considerable public effort. Their greatest failing will be the difficulty of enforcement. For vessels not flying the flag of a Party or having nationals of the Party aboard, they will only be effective if they come within the jurisdiction of a Party to the . . . treaty.'[112]

[106] Supra n. 74, O'Keefe, at p. 54.
[107] Garabello, R., (2004), 'Sunken Warships in the Mediterranean. Reflections on Some Relevant Examples in State Practice Relating to the Mediterranean Sea', in *La protezione del patrimonio culturale sottomarino nel mare Mediterraneo*, T. Scovazzi (Ed.), 171-202, Giuffrè (Milan), at p. 197; Supra n. 88, Strecker, at p. 75; Ronzitti, N., (2012), 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law', in *Yearbook of the Institute of International Law - Volume 74 (Session of Rhodes, 2011)*, 130-177, Editions A. Pedone (Paris), at pp. 139-140.
[108] Supra n. 81, Guérin.
[109] Supra n. 81, Guérin.
[110] Supra n. 80, Risvas, at p. 589.
[111] Supra n. 91, Adlercreutz, at pp. 311-312.
[112] Supra n. 98, González, O'Keefe and Williams, at pp. 67-68.

However, this view does not appear to consider that a regional approach has the capacity to introduce more meaningful rules and systems so as to collectively monitor and enforce against such free riders and third states in the first place. Indeed, there are likely to be far more non-state parties and non-compliers within a *global* treaty framework, such as the UNESCO Convention.

In response to O'Keefe and Adlercreutz, one could ask whether a subregional agreement – which could one day feasibly include rules for jointly on collaborating in monitoring and reporting suspicious activities, raising standards of inspection by port authorities and coastguard units, coordinating rules on at-sea boarding or inspection, facilitating cross-border arrest and criminal prosecution, collectively pooling enforcement and coastguard resources, sharing security technology and data (e.g., surveillance equipment and data, criminal reports, missing cultural property lists), harmonising rules and legislation (including even rules which can be directly enforced against non-complying national government and agencies), developing funds for cross-border assistance and sectoral economic adjustment, provision and joint development of security technology, deployment of cross-border reporting incentives, compiling a database of 'blacklisted' and 'greylisted' vessels and persons who cannot use port facilities or who receive more vigilant inspections, rules for inter-regional cooperation and coordination of listed vessels and individuals or other security information, and introducing more detailed and harmonised rules for the allocation and joint management of 'protected zones' around UCH sites of shared regional importance – would not assist in addressing such third state free riding. Indeed, O'Keefe even recognises that harmonised port state measures across regions would go a long way to solving free riding, which itself has been principally driven by regionalism.[113]

As Ooms noted in interview, the higher the 'level' at which international negotiations take place, the 'more vague and strategic it is [and] the less effect it has.'[114] Most writers on UCH policy have therefore increasingly come around to a more forward-looking view which recognises the significant potential of lower-scaled regional approaches, pursued completely in parallel and in full complement to the more vague and principle-based global level treaties which are preoccupied with everybody keeping as much sovereign

[113] Supra n. 74, O'Keefe, at p. 82.
[114] Supra n. 42, Ooms.

control as possible. As noted above, there is a far lower threshold for collective action to be achieved at the regional level and states will be more willing to sacrifice some semblance of national sovereignty in favour of protecting regionally shared and enjoyed cultural heritage. As Risvas has said, '[r]egional cooperation could also avoid the dangers of a universal approach [where such agreements] providing for information sharing and based on port jurisdiction could create a protective web. States could impose conditions or close their ports to ships allegedly engaged in activities detrimental to the protection of UCH.'[115]

By providing more detailed rules of cooperation which anticipate global public good collective action weaknesses and security challenges before the event, it is therefore possible to enhance security across all regional ports and auxiliary security units, and within and between maritime sectors, thus foreclosing the space to free riders. A regional approach has proven very effective in the case of marine environmental challenges which are also under the very same threat of being undermined by third parties from outside the region, such as protection against pollution, health and safety failures, and overfishing. The very aim of Regional Fisheries Management Organisations and the port state measure MOUs have been to regulate such non-regional actors.[116]

It also does not make sense to argue that UCH is *not* a regional issue, warranting a transnational response. For example, while Ooms recognised that there are likely to be some benefits of regional cooperation in the protection of UCH, such as sharing best practices, he urged caution and suggested that only pan-European issues need to be solved at a pan-European level.[117] For him, fishing was such an issue that necessitates such detailed schemes of transnational cooperation, saying 'the fishing front is really a European front because it's so transnational; the Dutch fishing vessels go to the UK, they go to Norway. The fish go everywhere.'[118] However, one could counter-argue that you

[115] Supra n. 80, Risvas, at p. 587.
[116] Pintassilgo, P., Finus, M., Lindroos, M. and Munro, G., (2010), 'Stability and Success of Regional Fisheries Management Organizations', 46(3) *Environmental and Resource Economics* 377-402; Pintassilgo, P. and Duarte, D.C., (2000), 'The New-Member Problem in the Cooperative Management of High Seas Fisheries', 15(4) *Marine Resource Economics* 361-378; Barkin, J.S. and DeSombre, E.R., (2013), 'Do We Need a Global Fisheries Management Organization?', 3(2) *Journal of Environmental Studies and Sciences* 232-242; Molenaar, E.J., (2011), 'Port State Jurisdiction To Combat IUU Fishing: The Port State Measures Agreement', in *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles*, D.A. Russell and D.L. VanderZwaag (Eds.), 369-386, Brill Nijhoff (Leiden); Kopela, S., (2016), 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons', 47(2) *Ocean Development & International Law* 89-130.
[117] Supra n. 42, Ooms.
[118] Supra n. 42, Ooms.

find UCH belonging or linked to different flag states or culturally linked states in different coastal jurisdictions; just as you often find vessels and nationals from various other states implicated in looting or other impactful activities. As Evans et al say, this misallocation of UCH interests between political spaces 'precipitates the need for shared, or collaborative management, as opposed to the more traditional concepts of cultural property, ownership, or even stewardship'.[119] Ooms did in some senses concede this point by later saying 'it could be beneficial to . . . have heritage maps on the transnational scale and discuss with each other in more detail . . . and also if it's cross-border heritage there might be also . . . influences from one national area to another national area'.[120]

As argued above, various factors can increase the likelihood of such regional efforts becoming more comprehensive and effective, such as: the smaller collection of state groupings; the stronger level of trust; the previous experience of cooperation; the greater interdependence; and the ability to integrate protection with other areas of cooperation. As Strati writes, it is possible to adopt '*more stringent* measures at the regional level.'[121] Similarly, Scovazzi has stressed often that the intention to pave the way to regional measures was so as to 'adopt rules and regulations which would ensure *better* protection' of UCH than under the Convention.[122] Similarly, in 2009, Williams wrote that a regional approach could be 'far more comprehensive and actively incorporate . . . elements of the Convention that the [maritime powers] could support.'[123] This could include 'retention of title in perpetuity, prohibition of unauthorized interference, a preference for in situ preservation, a system of authorization incorporating the Annex to the Convention, formulation of a management and research framework, and a declaration that the agreement is intended to give effect to the Parties' obligation under Article 303' of the LOSC.[124] As Sarid wrote recently, in the same way, regional agreements 'can be more conducive to the specific countries' interests.'[125]

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[119] Evans, A.M., Russell, M.A. and Leshikar-Denton, M.E., (2010), 'Local Resources, Global Heritage: An Introduction to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 79-83, at p. 82.
[120] Supra n. 42, Ooms.
[121] Strati, A., (2006), 'Greece', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 97-126, Martinus Nijhoff (Leiden), at p. 126 (emphasis added).
[122] Scovazzi, T., (2014), 'Underwater Cultural Heritage as an International Common Good', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 215-230, Hart (Oxford), at p. 227 (emphasis added).
[123] Supra n. 98, González, O'Keefe and Williams, at p. 64.
[124] Ibid.
[125] Supra n. 97, Sarid, at p. 257.

Regional cooperation is also an opportunity to share best practices and for providing innovative labs for testing and trialling new means of inter-state cooperation and integration in protecting UCH. As Dromgoole writes, '[s]uch cooperation can lead not only to improvements with respect to the day-to-day practicalities of management of UCH within the region, but also – through the sharing of ideas, experiences and best practice – with respect to the general management techniques employed.'[126] As Maes also said in his response, '[c]ooperation between states (bilateral, regional and universal without UNESCO) should in particular be the case in the protection of ship wrecks (cooperation coastal state – flag state) and for other UCH with the objective of cooperation for in situ scientific research, data exchange, knowledge sharing, state practice in policy and the implementation of the UNESCO Convention in national legislation.'[127] Peeters also responded that he would prefer 'a regional (cross-national)' effort, which achieves 'a common research approach and dedicated mutual involvement through input of expertise (and equipment).'[128]

Fitting with the theoretical arguments raised above, regional cooperation also provides an opportunity to pool resources and coordinate activities for mutual benefit, thus leading to greater collective output of UCH protection. For example, O'Connor writes how regional cooperation over UCH protection might have assisted in the listing and protection of the *Carpathia* wreck which, while feasibly open to listing under Irish legislation, would not have been very effectively protected without additional support from regional states. She writes that, '[p]erhaps if there had been a format for consultation and action between a number of adjacent States with a set procedure in place, things might have worked out differently. A co-operative approach is likely to be favoured in similar instances in the future.'[129]

González has also, somewhat indirectly, supported all of the arguments raised above with regard to the benefits available by pursuing a regional approach in tandem with the international approach. Although he was making a tenuous assertion that states within sea basins are better at regional cooperation than states sharing a coastline in open ocean,

[126] Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 311.
[127] Maes, F., (2018), Written Response of Frank Maes, 16 March 2018, Filed with Author.
[128] Peeters, H., (2018), Written Response of Hans Peeters, 28 April 2018, Filed with Author.
[129] O'Connor, N., (2006), 'Ireland', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 127-144, Martinus Nijhoff (Leiden), at p. 142.

he was indirectly raising arguments in favour of regional cooperation by saying that 'regional states are usually all collaborating together on fiscal measures and coast guard authorities'.[130] They 'are used to collaborating together and they are able to stand together in ensuring any recovered artifacts or exploitation of wrecks remains within the region, they are therefore more likely to be happy to share information and keep each other informed of wrecks in the area.'[131] Furthermore, the 'various environmental and fisheries agreements . . . could make it easier for such States to mutually monitor the exercise of due diligence regarding activities that may incidentally affect UCH.'[132] Williams makes a similar point about the familiarity and better integration which is possible in regional contexts:

> 'You have precedent. You have OSPAR. You already have North Sea agreements which have been successful for fishing, for environment, pollution. You've got a well-trodden path. […] And I think regional agreements [should be] piggybacking on the track record of environmental regional agreements, because that's familiar. That's comfortable.'[133]

The critical point, as was explored in detail across Chapters 3 to 5, is that the ratification of the UNESCO Convention by a state means very little in isolation. What makes the difference is the actual implementation and enforcement of impactful legislation, wherein states agree to curtail other economic and domestic priorities in preference to protecting an unknown and unregulated resource, for which most of the benefit might be leaked to external communities and future generations. Regional cooperation therefore provides an opportunity for a lower subset of states to collectively negotiate substantive legal solutions which can deliver mutual benefit, while also requiring less trust-building and being at less risk to free riding or uncooperative states.

As Ooms said in interview, the principle of subsidiarity would mean it is always worth asking what is the optimum level at which to address a particular issue.[134] As both he and Altvater rightly pointed out, the higher the level, the more people involved, the more

[130] González, A.W., (2006), 'The Shades of Harmony: Some Thoughts on the Different Contexts That Coastal States Face as Regards the 2001 Underwater Cultural Heritage Convention', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 308-312, Cambridge University Press (Cambridge), at pp. 309-310.
[131] Ibid.
[132] Ibid.
[133] Supra n. 74, Williams.
[134] Supra n. 42, Ooms.

difficult it is to find an impactful lowest common denominator between them.[135] This was demonstrated with the UNESCO Convention itself which, other than the widely accepted Rules in the Annex, struggled to go much further than the LOSC in terms of relative rights and responsibilities. However, as Chapters 3 to 5 examined, what matters more when addressing the externalities of global public goods appears to be the willingness of nation states to acquiesce in their national sovereignty on certain matters and to surrender their exclusive freedom to regulate issues which cause spillovers. If they are unwilling to do this at a regional level, among a smaller number of states with which they share a great deal of interdependence, trust, integration and cooperative practice, then it is certain that cooperation and compliance will be even weaker at the global level.

As was argued in Section 1, this has increasingly become recognised with the transnational and global public good context of marine environmental governance. As Maarleveld said in interview, for environmental issues 'some lawyers already 10 or 20 years ago said we should go completely away from the way of organising international law on the basis of territories.'[136] Similarly, as Altvater said, regional conventions 'are a very nice way to bring countries together and to make them work together.'[137] For example, 'countries bordering the Baltic Sea are discussing issues around environment, economy, maritime spatial planning, and this is really the way it should be.'[138] Therefore, while it is good for states to have their own EEZs, 'they should actually work on that more effectively and extend [their] supranational contracts'.[139] Williams raises a similar point that civil servants and governments are already comfortable operating and sharing governance regionally in terms of natural heritage protection.[140]

In other words, all of the literature review and most of the interview responses in this study would find a persuasive argument that far greater effort needs to be employed in the pursuance of more detailed and meaningful regional systems of cooperation in protecting UCH. The concerns with regard to the threat from third states – as felt by O'Keefe, Guérin, Adlercreutz, and many others in the UCH community – appear to be overstated and a perhaps distorted understanding based on prior experiences at that point, which do not fully appreciate the potential of regional webs of protection as a mechanism

[135] Supra n. 42, Ooms; Supra n. 78, Altvater.
[136] Supra n. 90, Maarleveld.
[137] Supra n. 78, Altvater.
[138] Supra n. 78, Altvater.
[139] Supra n. 78, Altvater.
[140] Supra n. 74, Williams.

for resolving many of the collective action and compliance weaknesses inherent in global-level multilateral frameworks. As Maarleveld said in interview, the 'regional protection of the joint heritage . . . would, protection-wise, be very productive.'[141] Similarly, Firth responds, with a hint of allusion to UK's political situation following the Brexit referendum in 2016, 'I think there is potential [for regional solutions] and ideally I think that it would be great to see them happening. It's just, at the moment, people are not in that space at the moment in a major way.'[142] This statement lands directly on a key issue, which is that while many may respect regionalism's potential value, they actually have more concern about the political feasibility of *achieving* such regional integration.

(c) The Actual Achievement of Regional Regimes

While the advantages may be clear, the actual achievement of regional multilateral solutions to protect UCH from indirect threats, even at the regional level, remains challenging. Not only did the 1985 Draft Convention fail to achieve Europe-wide protections beyond the limited provisions in the LOSC, but even a multilateral agreement between key European states to protect a wreck of common cultural importance on Finland's continental shelf has struggled to curtail unauthorised interference by free riders.[143] As Rochette and Chabason have said of regional agreements in the natural heritage context, 'regional initiatives too often suffer the same difficulties as global mechanisms: poor institutional coordination, insufficient funding[, and] disregard of legal instruments.'[144] It is also worth acknowledging that many regions around the world not only lack the resources or political goodwill to fully engage in regional cooperation, but might also lack the same enthusiasm for regionalism than can be found among European commentators – such as the present author – who are more comfortable with supranational regulation.[145] Similarly, as noted above, there are always challenges in terms of finding

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[141] Supra n. 90, Maarleveld.

[142] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File.

[143] Jacobsson, M. and Klabbers, J., (2000), 'Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia', 69(3) *Nordic Journal of International Law* 317-332.

[144] Supra n. 35, Rochette and Chabason, at p. 120; Rothwell, D.R., Oude Elferink, A.G., Scott, K.N. and Stephens, T., (2015), 'Charting the Future of the Law of the Sea', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 888-912, Oxford University Press (Oxford), at p. 904.

[145] Sbragia, A., (2010) 'Multi-Level Governance and Comparative Regionalism', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 267-278, Edward Elgar (Cheltenham), at p. 268; Dreyer, M. and Sellke, P., (2015), 'The Regional Advisory Councils in European Fisheries: An Appropriate Approach to Stakeholder Involvement in an EU Integrated Marine Governance?', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 121-140, Routledge (Abingdon), at p. 123. For example, Shaffer also says how Europeans are more accustomed to plural regulation at multiple scales (Shaffer, G.C., (2012), 'International Law and Global Public Goods in a Legal Pluralist World', 23(3) *European Journal of International Law* 669-693, at p. 671).

the lowest common denominator and coordinating interests across multiple interest groups.[146] It is also difficult to ignore the rise of populist nationalist dissidence, as well as the twin developments of United States President Trump's election and the UK's vote to leave the European Union in 2016.

Nevertheless, on account of all of the evidence above that regional approaches could be more effective in the protection of the historic marine environment, while also providing a vital pathway towards more advanced global and local systems, the next stage for UCH protection must be the expansion of detailed regimes at the regional level. As noted above, if states are unwilling to commit resources and energy or to constrain their own sovereignty at the regional level, then there is little hope at the global level. However, as highlighted by Firth in interview with a patent allusion to the present political climate in Europe and elsewhere, the current climate is perhaps unfavourable to further European integration. He adds, 'if I was to propose to colleagues that now would be a great time to have a conference . . . with a view to setting up some kind of framework, you know, the mood music is not good.'[147] Similarly, Maarleveld responds how it 'is easily said, but not easily done of course. And, let's be honest, the international developments or the national developments in some major countries are not very promising at present.'[148]

Indeed, all interviewees acknowledged challenges presented by the shift in narrative in many countries back towards nationalism and away from the idealised notion of European supranationalism. As noted above, Ooms said one must think carefully about what level is needed and whether it is a pan-European issue which needs a pan-European response.[149] Similarly, both Maes and Williams warned against making this a European Union matter, given the current climate surrounding the political union. As Williams said, 'don't do it as an EU instrument. That's the kiss of death!'[150] Maes felt that, instead, an MOU between states would be sufficient.[151] Nevertheless, while such memoranda of understanding can be useful for coordinating activities, they perhaps lack the level of integration and harmonisation which is required for many of the unpredictable, varied and

[146] Supra n. 42, Ooms; Supra n. 78, Altvater.
[147] Speaking with regard to the United Kingdom, Firth also adds, it 'is made doubly difficult post-Brexit [where there is so much] uncertainty over the UK's place in the world and how it's going to go forward.' (Supra n. 142, Firth).
[148] Supra n. 90, Maarleveld.
[149] Supra n. 42, Ooms.
[150] Supra n. 74, Williams.
[151] 'I don't think we need a new treaty. A Memorandum of Understanding would be more suitable and effective to enhance bilateral, regional or subregional cooperation. This should not be an EU matter.' (Supra n. 127, Maes).

complex challenges facing UCH from incidental, illicit and indirect threats. Alternatively, Williams suggested that, in the UK at least, the situation surrounding Brexit could provide an opportunity, rather than a threat, to better regional-level activity. States 'are taking this national route and therefore I think a regional agreement sits more comfortably. […] The message that [the British public apparently] want to send is that "We're out of the EU, but not Europe." . . . I think it's actually an easier sell.'[152]

Unfortunately, as has been argued throughout this study, the only real force that will drive forth regional-level cooperation is the political incentivisation of governments who are, otherwise, ever-increasingly constrained in terms of workload and resources. As Firth says, 'you would be looking to public authorities who have generally got *no* resources and are definitely not looking to extend their remit. And I think that's a major problem'.[153] As he rightly points out, there is a great deal of variation between states in Europe as to their motivation towards a regional solution and much will depend on the target objective.[154] But ultimately, he says, 'you have to have a very clear need, something that can't be resolved anywhere else and the thing that can't be resolved has got to be considered so significant that people will get together over it.'[155] However, the findings in this thesis across Chapters 3 to 5 would suggest that the alternative national-international approach has been, and most certainly will continue to be, less than effective. The very difficulty for UCH is that it is under-prioritised by national governments, given its global public good nature. As such, effective progress needs to be sought at any and all levels. As was demonstrated in Chapter 4, relying on political incentivisation will only get so far; and, in the context of UCH protection and its low priority on the government's agenda, it will not get far at all.

However, the lower threshold needed to achieve mutual gain, as well as the higher levels of trust and interdependence between regional states, will each increase the willingness of states to concede exclusive freedoms and to engage in detailed regime-thickening between neighbours as opposed to between distant continents. It is for this reason that most in the UCH community have recognised that enclosed and semi-enclosed seas, as well as island groups or neighbouring coastal states, i.e., subregions, have an even stronger capacity for achieving the initially effective regional solutions. This is especially

[152] Supra n. 74, Williams.
[153] Supra n. 142, Firth.
[154] Supra n. 142, Firth.
[155] Supra n. 142, Firth.

because of their shared sense of heritage and their recognition that working together will benefit the regional sea's heritage as a whole.[156] As Maarleveld has said, '[a]cceptance of the past as a common heritage is perhaps a more realistic basis for future development and future co-operation.'[157]

Similarly, contradicting his earlier statement on the inability of regional systems to address free riding, O'Keefe writes that:

> '[R]egional agreements offer great scope for enhanced protection if the States concerned have a common attitude to this heritage. Geographic proximity may well be insufficient to provide that common attitude. Shared cultures and history are a better glue that will unite particular groups of States to protect their underwater cultural heritage. This may be found in areas such as the Mediterranean, the Baltic, and the Caribbean.'[158]

Forrest also points to Southern Africa as an area where regional cooperation would be highly effective for sharing resources and coordinating assistance to protect shared heritage.[159] Plus, as was highlighted above, Latin America, the Caribbean, the Baltic and the North East Atlantic are further promising examples. Similarly, Firth points to the Dogger Bank as a UCH hotspot where states across the North Sea are likely to find a common cause for collaboration towards the landscape's protection.[160] Ooms also reiterates that things are always going to be politically and practically more challenging 'than if you do it with a smaller group', referring for example to cooperation between the Netherlands, Denmark and Germany over the Wadden Sea.[161] Here, he notes, you are more likely to find 'frontrunners' who are far more engaged with the specific concerns in question.[162]

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[156] Supra n. 73, Scovazzi, at p. 291; Supra n. 130, González, at p. 310; Supra n. 80, at p. 587; Supra n. 72, Aznar; Supra n. 142, Firth; Supra n. 90, Maarleveld; Supra n. 42, Ooms; Supra n. 78, Altvater.
[157] Maarleveld, T.J., (2006), 'Netherlands', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 161-188, Martinus Nijhoff (Leiden), at p. 183.
[158] Supra n. 74, O'Keefe, at p. 54.
[159] Forrest, C., (2006), 'South Africa', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 247-270, Martinus Nijhoff (Leiden), at p. 269.
[160] Supra n. 142, Firth.
[161] Supra n. 42, Ooms.
[162] Supra n. 42, Ooms.

For many, working in such a regional or subregional manner is therefore likely to be more attractive than at the global level. For example, both Maarleveld and Williams found it noteworthy that Latin American states appear particularly motivated to keep exploring regional solutions (in tandem with global) in order to effectively club together and more forcefully shake off Spanish claims of national patrimony over colonial-era heritage.[163] O'Connor also reassures that the state of Ireland would be much more supportive of taking a pan-European approach to UCH.[164] In other words, with more targeted effort and coordination among the UCH community, there is a significant opportunity to strengthen the protection of UCH by regionalism, whether without or throughout the UNESCO and LOSC Conventions. Furthermore, such efforts would likely advance the global and community regulatory levels yet further, by encouraging states to make more meaningful concessions and to acquiesce sovereignty in a greater number of areas outward towards regional actors and agencies. From here, state governments will become accustomed to integrated methods of collaboration and the production of collective gains over an increasing number of public goods. As Maarleveld responded, although it will present a difficult political challenge, 'nevertheless, I think that is the way to go and it is not completely unrealistic.'[165]

(d) Choice Between Different Types of Regional Governance

The question then becomes which pathway to adopt between the multilateral, supranational, or transnational forms of regionalism. As was noted above, many have expressed concern at the notion of an "overbearing" supranational and technocratic authority, such as the EU, assuming competence over a question which is particularly sensitive in terms of national and cultural identity, or which they view as the exclusive prerogative of the nation state.[166] Even the EU Council itself has recognised the risks of becoming involved in UCH protection, having refused to pursue a request to explore the effective harmonisation of rules implementing the UNESCO Convention.[167] Indeed, although he has acknowledged that supranationalism is likely to be eventually necessary,

[163] Supra n. 90, Maarleveld; Supra n. 74, Williams.
[164] 'A co-operative approach to the protection of UCH in the EEZ and on the continental shelf is likely to find favour as the preferred option in Ireland. Perhaps one useful model for at least pan-European co-operation might be the EU Guidelines for Administrative Co-operation between Member States/Competent Authorities in relation to the Export of Cultural Goods.' (Supra n. 129, O'Connor, at p. 143).
[165] Supra n. 90, Maarleveld.
[166] See also Supra n. 71, DeRudder and Maes, at p. 21.
[167] Supra n. 71, DeRudder and Maes, at p. 21 (per Pieters). Note also Aznar's response in interview: 'The European Union has no competences at all over the protection of cultural heritage. But it has some indirect competences over some other questions, such as marine spatial planning, fisheries, environment, or the integrated coastal global management.' (Supra n. 72, Aznar).

because 'the nation state is simultaneously too big and too small to cope with the real-world problems', Firth was also of the view that a regional regime in Europe is only likely to consist of states agreeing how to coordinate their sovereign rights, which are effectively maintained in relation to UCH, rather than all sharing a common responsibility and agreeing to soften the role of sovereignty and inter-state jurisdictional rules.[168] Similarly, Williams's discussion of an initial regime for the Battle of Jutland wrecks had terms which emphasised the allocation of sovereign interests, rather than the development of private law harmonisation and multi-level community integration.[169] As Altvater said 'I think that the big dream should be that we feel [like] a work community, but of course we are far away. [Even] in the Baltic Sea, they are all thinking nationally.'[170] She also notes how it is difficult to secure concessions between nation states in a highly varied and more politically intense region like the Mediterranean, where 'every country is working on its own and they're not really interested in collaboration. That's why they have problems, of course.'[171]

Perhaps these views are all correct and perhaps, therefore, the conventional inter-national pathway, whether in the form of an MOU or multilateral treaty, is the most realistic option for UCH protection just in the immediate era, as opposed to more sovereignty-constraining forms of supranationalism. Indeed, the Brexit vote in 2016 would suggest that supranationalism, while it may carry many collective action benefits, is not likely to be a widely popular approach against the increasingly vocal anti-Europe dissidence, even if such integration is going to be better at addressing global or pan-European concerns. Nevertheless, as was demonstrated in Chapter 3, Section 5 – with regard to ever-increasing transnationalisation, regionalisation and integration of fisheries governance – such a multilateral agreement over UCH (productively interoperating with the UNESCO agreement) would merely represent the "next stage" in the inevitable progression to ever-greater and more-intensive regionalisation in the cosmopolitan future. It could significantly enhance regulatory harmonisation by agreeing certain minimum standards and could provide a framework for facilitating future dialogue and collaboration across borders.

[168] 'I certainly don't think they pool responsibility across them. They wouldn't let go of British sovereignty, in exchange for Germany sovereignty, or a collective with all of them together[;] a joint enterprise. […] I think it would be regarded as them cooperating with respect to looking after "theirs" more effectively, rather than a pooled responsibility towards all of them, irrespective of nationality.' (Supra n. 142, Firth).
[169] Supra n. 98, González, O'Keefe and Williams.
[170] Supra n. 78, Altvater.
[171] Ibid.

In the long-run, a supranational approach – wherein governments no longer have the power to think in a manner exclusive of everyone else but their own citizens – is going to be the most effective. The European Union could not only coordinate funding towards achieving pan-European public goods, but can compel nation states to more fully implement agreed rules and can empower individuals and communities to enforce harmonised standards across borders.[172] Furthermore, their large mandate over other transnational matters can lead to better integration and harmony between different competing sectors in the maritime context. Indeed, even though Maes responded that the protection of UCH should not be an EU issue, he has elsewhere contradictorily noted that protection of UCH in Belgium is challenging because much of the threat to UCH comes from fishing which is a pan-European issue of EU competence.[173] This could be achieved more quickly perhaps by taking a sea basin or subregional approach, which could be politically and practically more feasible than a Europe-wide approach. From there, one could witness deeper integration and regulatory harmonisation on UCH protection which moves beyond the trite inter-state and nationalistic narratives which have undermined effective protection up to now.

As Ooms said of marine environmental protection:

> 'This does not mean that cooperation should go further than this […]. The question is more in what form, what kind of institutional arrangement. Do we want the EU to have a leading role or let the sea basins discuss their issues . . . and develop their own institutional arrangement? This last option can be more effective in reality.'[174]

Finally, the transnational pathway is not mutually exclusive of the other two and, in fact, is likely to be achieved far better as a result of better inter-state regulatory harmonisation and the facilitation of regional agencies and frameworks. However, as explored in Chapters 6 and 9, global and community-level governance and collaboration by hybrid and non-state actors can also take place on transnational (and hence regional) scales, with or without governmental intervention. Yet, such transnational networks and regimes can

[172] Supra n. 71, DeRudder and Maes, at p. 21 (per DeRudder).
[173] Supra n. 127, Maes; Supra n. 71, DeRudder and Maes, at p. 15.
[174] Supra n. 42, Ooms.

be cultivated much more swiftly when facilitated by national-level and regional-level law.[175] As Aznar responded, '[c]ollaboration, either hard (through new agreements) and soft (through other types of conversations), must be tunneled through these regional environments.'[176] As Altvater also said, states also need to start 'using tools, like MSP, and have some channels now open to each other and to really combine users and protection and to be more flexible across borders. This is, I think, the way it should be'.[177]

Thus, the UCH policy community should also be continually exploring the means to build better communication, coordination and collaboration towards UCH protection among all maritime, coastal and inland communities – including public, private and hybrid actors – across a regional frame. This would also include integrating efforts to protect UCH across different sectors, thus more effectively saving resources and targeting key groups. As Firth suggests, it would make a lot of sense to integrate the development of better protection for UCH within regional regimes dealing with fishing or energy generation.[178] Throughout Chapter 9, therefore, it is argued that strategic utilisation of non-state actors and communities as rule makers and rule enforcers could also serve to address concerns raised, for example by Firth above, regarding the lack of public resources towards common goals.

4. Conclusion: Adopting a Regional Governance Approach to Protecting Underwater Cultural Heritage

It is regrettable that efforts by Italy to draft a new Mediterranean agreement on UCH protection around the time of the UNESCO Convention appeared to be framed as an "alternative" to the international-level treaty; or that the failed European Draft Convention in 1985 was preoccupied with jurisdictional issues which became the preoccupation of the UNESCO Convention.[179] These events may have led to a misconception among many in the UCH community that regional agreements are only helpful for *avoiding* the UNESCO Convention, rather than serving to *facilitate* its effectiveness and implementation. As Williams relayed in interview, 'the view seems to be that it's one or the other. I don't buy it.'[180] As was demonstrated by Tanaka's

[175] See Chapter 10.
[176] Supra n. 72, Aznar.
[177] Supra n. 78, Altvater.
[178] Supra n. 142, Firth.
[179] Supra n. 107.
[180] Supra n. 74, Williams.

insightful monograph on integrated ocean management in 2008, it is possible and desirable to have regional 'integrated' solutions operating in parallel and in complement to higher-level treaties, such as the LOSC (and the UNESCO Convention), which just set the initial rules for sovereign ownership and jurisdictional power.[181] This complementarity between national-level regulation and regulation at other levels is therefore explored in Chapters 8 and 10.

Further, as was demonstrated above with the examples of the UNESCO 1970 Convention on the Illicit Import and Export of Cultural Property and the Paris MOU, there is evidence that not only are regional regimes more detailed and impactful than global-level treaties, but they can significantly raise and strengthen standards at the global-level. Another pertinent example of this vertical expansion, from regional level cooperation towards the global, was the quick adoption by the United Kingdom and other European states of the Rules contained in the Annex to the UNESCO Convention, predominantly on the basis that the regional-level Valletta Convention had already brought legislation into harmony with these higher standards.[182] Overall therefore, the findings in this chapter have provided persuasive evidence that the concerns among the UCH community about regional-level treaties appear misplaced and that new regional agreements should now be more seriously explored or pursued, in tandem with the traditional international-level efforts, whether through multilateral, supranational, or pluralistic pathways. As Chapter 10 argues, such regional approaches are complementary and would integrate well with taking a broader multiple-level approach to governance.

[181] Supra n. 56, Tanaka.
[182] UK Parliament, (2005), House of Commons, 24 January 2005, *Hansard*, Column 46W (at: http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050124/text/50124w13.htm; accessed 1 May 2019).

Chapter 8

A National Governance Approach to the Protection of Underwater Cultural Heritage

Chapter Abstract:

Looking at the national level within a multi-level analysis, this chapter in effect argues in the opposite direction from earlier chapters by providing a defence of the traditional national-level system of law and governance, as manifested by public international law, private international law and domestic law. It provides just some of the many arguments why the nation state will continue to be the most important player in the global governance framework, operating as a vital democratic and legitimate system coordinating activity at the heart of a multi-level network. However, it also robustly asserts that taking a 'transnational' or 'multi-level' approach need not be mutually exclusive to the use of traditional national legal processes and that both approaches can and – indeed – should interoperate in a fruitful symbiosis. It then examines this against the protection of underwater cultural heritage (UCH), showing that there remains a justified belief that the state and traditional models of public international law and zonal ocean regulation should continue to play a central role in driving forward future systems of protection of UCH. This sets the stage for conclusions later in Chapter 10, which promotes the continued role of each global, regional, national and community-level approaches.

1. The Indispensable Strengths of National-Level Governance

National-level governance refers to the majority of our present legal system protecting UCH, which has already been explored at length by other researchers over the past few decades, including the tools of national law, private international law, and public international law – as well as the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention)[1] and the UN 1982 Convention on the Law of the Sea (LOSC)[2] – as introduced in Chapters 1 and 2, and critiqued in Chapters

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.
[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.

3 to 5.[3] It effectively encapsulates what has been once widely defined as the 'Westphalian' approach to understanding law and jurisprudence, as underscored in Chapter 5. Given that this Westphalian-esque understanding of law has been adopted by almost all of the existing literature on UCH protection, this brief chapter does not need to explore its precise permutations and applications to UCH. Indeed, earlier chapters have already scrutinised this national-level legal system in detail and other diverse literatures are available for exploring the substantive legal rules inside the national-level system. This chapter instead seeks to look more critically at the arguments taken by this thesis across Chapters 3 to 9, in order to provide some *defence* of the traditional and horizontal national-level approach.

It must be stressed that an effective multi-level governance approach would not just recognise the value and importance of regulation at the national level, but sees it as likely to remain the *most* important level of regulation for some time.[4] In other words, the proposed integrated approach in this thesis does not seek to *replace* national regulation with supranational or transnational law; but to *complement* and enhance it, specifically in those areas where national regulation is prone to defective global public goods production. The acknowledgement that national-level governance continues to be the most important level of regulation is widespread and rarely disputed.[5] Many have contended, for example, that the democratic election of national governments, as well as processes which increase democratisation, such as political parties, media coverage, and electoral systems, makes governmental regulation a vital democratising and legitimising

[3] Vrdoljak, A.F., (2014), 'Human Rights and Cultural Heritage in International Law', in *International Law for Common Goods Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 139-173, Hart (Oxford), at p. 142.

[4] Marauhn, T., (2008), 'Changing Role of the State', in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 727-748, Oxford University Press (Oxford), at pp. 728-729; Eckerberg, K. and Joas, M., (2004), 'Multi-Level Environmental Governance: A Concept Under Stress?', 9(5) *Local Environment* 405-412, at p. 411; '[D]espite the proliferation of non-State entities, States remain the primary protagonists on the international scene.' (Chechi, A., (2015), 'Non-State Actors and Cultural Heritage: Friends or Foes?', 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 457-479, at p. 471); MacCormick, N., (1993), 'Beyond the Sovereign State', 56(1) *Modern Law Review* 1-18; Walker, N., (2016), 'Constitutional Pluralism Revisited', 22(3) *European Law Journal* 333-355; Bodansky, D., Brunnée J. and Hey, E., (2008), 'International Environmental Law: Mapping the Field', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 1-28, Oxford University Press (Oxford), at p. 22.

[5] Ibid; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford), at p. 466; 'Despite the increasing involvement of non-state actors in these international institutions, it is clear that states retain a tight grip on international law-making activities.' (Harrison, J., (2011), *Making the Law of the Sea: A Study in the Development of International Law*, Cambridge University Press (Cambridge), at p. 283); Boyle, A. and Chinkin, C., (2007), *The Making of International Law*, Oxford University Press (Oxford), at pp. 41-46.

function in the entire global governance framework.[6] Indeed, even though global law seeks to constrain sovereignty, non-state actors are likely to negotiate mutually acceptable solutions in collaboration with states and within the bounds of national law when possible. Global governance, here in a multi-level formulation, therefore, often seeks to *enhance* national regulation by a number of facilitative means, such as developing collective goodwill and enhanced capability for transnational policy cooperation, strengthening or empowering communities to bring political pressure, realigning resources through capacity building, or supporting enhanced co-regulation by enabling the flow of transnational norms.

Zürn once summarised three widely accepted reasons why the nation state will remain the key player in global governance.[7] First, the development of global governance will 'apply only to denationalized issue areas'.[8] In other words, for issues which remain inherently national – such as public services, taxation, education, internal security, strategic investment, and so on – the principle of subsidiarity would argue that the state is the key player (except where issues might be better served at the regional or community level). Only for inherently *transnational* issues, such as marine management in a shared ocean, or those issues carrying a spillover of abstract values to external communities, such as the protection of global cultural and natural heritage, must national governments be further restricted from self-centred decision-making where it might occur.[9]

Second, 'even in strongly denationalized issue areas . . . it is hard to see how governance goals can be achieved without the nation-state [which] seems to be indispensable. This is due to its control of resources based on its legal monopoly on the use of force and its capacity to raise taxes.'[10] Finally, Zürn acknowledged that while international institutions are increasingly receptive to non-state actors, states will remain the principal aggregators and, thus, receptors of political pressure for some time.[11] Indeed, the process for creating

[6] Franck, T.M., (1992), 'The Emerging Right to Democratic Governance', 86(1) *American Journal of International Law* 46-91; Peters B.G. and Pierre, J., (2006), 'Governance, Accountability, and Democratic Legitimacy', in *Governance and Democracy: Comparing National, European and International Experiences*, A. Benz and Y. Papadopoulos (Eds.), 29-43, Routledge (Abingdon); Goetz, K.H., (2008), 'Governance as a Path to Government', 31(1-2) *West European Politics* 258-279.
[7] Zürn, M., (2012), 'Global Governance as Multi-Level Governance', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 730-774, Oxford University Press (Oxford), at p. 735.
[8] Ibid.
[9] See Chapter 4.
[10] Supra n. 7, Zürn, at p. 735; Barrett, S., (1999), 'Montreal versus Kyoto: International Cooperation and the Global Environment', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 192-219, Oxford University Press (Oxford), at p. 194.
[11] Ibid.

and enforcing national law is more familiar to most non-state actors, thus providing high levels of predictability, stability and accountability at the heart of the global governance framework.

As a result, the state becomes something of a legitimiser, administrator, and facilitator, who provides a vital democratic balance between other competing and overlapping governance regimes.[12] Only in those cases where inter-national bargaining fails to produce effective transnational standards, would alternative means – through a multi-level and transnational framework – seek to sidestep national governance and, thereby, either drive up its quality or bypass it.[13] Hence, we see many writers in the 21st Century referring to new forms of "sovereignty" – such as new,[14] cosmopolitan,[15] interdependent,[16] relational,[17] responsible[18] post-Westphalian,[19] contingent or conditional forms of sovereignty,[20] and so on – in recognition of the increased position of trusteeship

[12] Genschel, P. and Zangl, B., (2008), 'Transformations of the State: From Monopolist to Manager of Political Authority', *TranState Working Papers*, No. 76, University of Bremen, Collaborative Research Center 597; Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at pp. 147-148.

[13] 'Typically, although states are the direct addressees of international environmental obligations, private actors are the ultimate regulatory target. Some international environmental regimes actually define the applicable standards of private conduct directly.' (Supra n. 4, Bodansky, Brunnée and Hey, at p. 20).

[14] Chayes, A. and Chayes, A.H., (1996), *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press (Cambridge, MA); Lake, D.A., (2003), 'The New Sovereignty in International Relations', 5(3) *International Studies Review* 303-323.

[15] Adelman, S., (2011), 'Cosmopolitan Sovereignty', C.M. Bailliet and K.F. Aas (Eds), 11-28, Routledge (Abingdon); Held, D., (2002), 'Law of States, Law of Peoples: Three Models of Sovereignty', 8(1) *Legal Theory* 1-44; Beck, U., (2006), *The Cosmopolitan Vision*, Polity Press (Cambridge).

[16] Perrez, F.X., (2000), *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, Brill (Leiden); Ţuţuianu, S.U., (2012), *Towards Global Justice: Sovereignty in an Interdependent World*, Springer (New York); Diehl, P.F. (Ed.), (2005), *The Politics of Global Governance: International Organizations in an Interdependent World*, 3rd Edn, Lynne Rienner (Boulder); Schrijver, N., (1997), *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge University Press (Cambridge).

[17] Stacy, H., (2003), 'Relational Sovereignty', 55(5) *Stanford Law Review* 2029-2060; Criddle, E.J., (2012), 'Proportionality in Counterinsurgency: A Relational Theory', 87(3) *Notre Dame Law Review* 1073-1112.

[18] Deng F.M., Kimaro S., Lyons T., Rothchild D. and Zartman D., (1996), *Sovereignty as Responsibility: Conflict Management in Africa*, Brookings Institution Press (Washington DC); Bellamy A.J, (2009) *Responsibility to Protect*, Polity Press (Cambridge); Glenville, L., (2013), 'The Myth of "Traditional" Sovereignty', 57(1) *International Studies Quarterly* 79-90.

[19] Jacobsen, T., Sampford, C. and Thukur, R. (Eds.), (2008), *Re-Envisioning Sovereignty: The End of Westphalia?*, Ashgate Publishing (Farnham); Engel, E.A., (2004), 'The Transformation of the International Legal System: The Post-Westphalian Legal Order', 23(1) *Quinnipiac Law Review* 23-46; Lansford, T., (2000), 'Post-Westphalian Europe? Sovereignty and the Modern Nation State', 37(1) *International Studies* 1-15; Dryzek, J.S., (2012), 'Global Civil Society: The Progress of Post-Westphalian Politics', 15 *Annual Review of Political Science* 101-119.

[20] Elden, S., (2006), 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders', 26(1) *SAIS Review of International Affairs* 11-24; Mathieu, X., (2018), 'Sovereign Myths in International Relations: Sovereignty as Equality and the Reproduction of Eurocentric Blindness', *Journal of International Political Theory* (Forthcoming); Dietsch, P., (2011), 'Rethinking Sovereignty in International Fiscal Policy', 37(5) *Review of International Studies* 2107-2120; Knell, K.E., (2018), 'A Doctrine of Contingent Sovereignty', 62(2) *Orbis* 313-334.

bestowed upon states towards the international community.[21] Quite what these forms of sovereignty mean, and the extent to which they really permit the international community to override the complete autonomy of nation states, or actually impose legal responsibilities upon states for unquantifiable harm to non-state actors, still seems open to a considerable amount of doubt, as has been argued by this thesis more broadly.[22]

However, the advantages to this traditional international approach, which could see most issues compressed into intergovernmental negotiations, are clear. For example, inter-state processes would be far more cost-effective and time-efficient.[23] Being managed by a hierarchised and hardened constitutional order which is more powerful and democratically legitimate, the negotiations can also be better kept on track, can result in perceptibly and practicably harder norms, can provide a sense of impartiality and trustworthiness, and can help ameliorate power disparity between stakeholders.[24] They could also lighten the workload of stakeholders, by enabling publicly-funded authorities to overtake the bureaucratic work of ocean management and allowing stakeholders to get on with their day-to-day activities.[25] Nation states therefore possess considerable democratic legitimacy and accountability, as well as effective and powerful tools for enforcement, such that they actually have the capacity to capture and control externalising behaviour in the first place.[26]

2. The Transnational Approach as a Multiple-Level Mix

(a) State Law versus Non-State Law

These very same advantages of state-based law – predictability, accountability, legitimacy, enforceability, funding, familiarity, stability, transparency, facilitative capacity – can therefore also point directly to most of the critical challenges facing non-state (transnational) legal processes which are promoted in Chapters 6, 7 and 9. A detailed analysis of these issues in the context of UCH protection is unfortunately beyond the

[21] Supra n. 4, Marauhn; Gavouneli, M., (2007), *Functional Jurisdiction in the Law of the Sea*, Martinus Nijhoff (Leiden).
[22] See Chapters 3, 4 and 5, particularly Chapter 5, Section 3(a); Supra nn. 4 and 5; Pitty, R. and Smith, S., (2011), 'The Indigenous Challenge to Westphalian Sovereignty', 46(1) *Australian Journal of Political Science* 121-139, at p. 125.
[23] See Chapter 9, Section 2.
[24] Ibid.
[25] Ibid.
[26] Ibid; Berman, P.S., (2015), 'Non-State Lawmaking through the Lens of Global Legal Pluralism', in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, M.A. Helfand (Ed.), 15-40, Cambridge University Press (Cambridge), at p.16.

space permitted in this study, which is focused only on establishing the initial case for integrated and multi-level solutions. However, it is worth acknowledging that the transnational and multi-level regulatory approaches proposed in this thesis are not always the most ideal approach in every factual context and, in many cases, may carry other weaknesses rendering them less effective than national law. For example, given that epistemic communities and non-governmental organisations (NGOs) are now given far greater responsibility under global governance, many studies have increasingly explored the legitimacy, transparency, and democratic accountability concerns that might arise by providing representation for civil society by private or unelected organisations.[27]

Edwards and Zadek, for example, while highlighting the committed nature and technical expertise of NGOs and other non-state actors, making them effective in governing on behalf of under-represented groups in global civil society,[28] also stress the importance of ensuring that their operations remain transparent and truly representative of the communities they support.[29] Kotzé has highlighted, thus, that 'some solutions to this legitimacy crisis [include] democratization, the integration of fragmented regimes, and the creation of a world environment organization. But these solutions are not without

[27] E.g., Bodansky, D., (1999), 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93(3) *American Journal of International Law* 596-624, pp. 596–624; Bodansky, D., (2008), 'Legitimacy', in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 704-726, Oxford University Press; Tallberg, J., (2016), 'Transparency', in *The Oxford Handbook of International Organizations*, J.K. Cogan, I. Hurd and I. Johnstone (Eds.), 1170-1192, Oxford University Press (Oxford); Koenig-Archibugi, M., 'Accountability', in *The Oxford Handbook of International Organizations*, J.K. Cogan, I. Hurd and I. Johnstone (Eds.), 1146-1169, Oxford University Press (Oxford); Zaum, D., 'Legitimacy', in *The Oxford Handbook of International Organizations*, J.K. Cogan, I. Hurd and I. Johnstone (Eds.), 1107-1125, Oxford University Press (Oxford); Shaffer, G.C., (2001), 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters', 25(1) *Harvard Environmental Law Review* 1-93, at p. 24; Kahler, M. and Lake, D.A. (Eds.), (2003), *Governance in a Global Economy: Political Authority in Transition*, Princeton, University Press (Princeton); Papadopoulos, Y., (2008), 'Problems of Democratic Accountability in Network and Multilevel Governance', in *Multi-Level Governance in the European Union: Taking Stock and Looking Ahead*, T. Conzelmann and R. Smith (Eds.), 31-52, Nomos Verlagsgesellschaft (Baden-Baden); Peters, B. and Pierre, J., (2004), 'Multi-Level Governance and Democracy: A Faustian Bargain?', in *Multi-Level Governance*, I. Bache and M. Flinders (Eds.), 75-89, Oxford University Press (Oxford); Harlow, C. and Rawlings, R., (2006), 'Promoting Accountability in Multi-Level Governance: A Network Approach', *European Governance Papers*, No. C-02-06, (at: http://www.connexnetwork.org/eurogov/pdf/egp-connex-C-06-02.pdf; accessed 1 May 2019); Morgera, E., (2009), *Corporate Accountability in International Environmental Law*, Oxford University Press (Oxford).

[28] Edwards M. and Zadek, S., (2003), 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors', in *Providing Global Public Goods: Managing Globalization*, I. Kaul, P. Conceição, K. Le Goulven, R.U. Mendoza (Eds.), 200-224, Oxford University Press (Oxford). See also Willetts, P., (2011), *Non-Governmental Organizations in World Politics: The Construction of Global Governance*, Routledge (Abingdon); Lewis, D. and Kanji, N., (2009), *Non-Governmental Organizations and Development*, Routledge (Abingdon).

[29] Ibid.

their own difficulties and they seem to have had little success to date.'[30] For Eckerberg and Joas, it is resolved by making effective choices between 'representative democracy' and 'deliberative policymaking', with the latter only being used when the former is not possible or suitable.[31] Community-level actors may also design legal norms in a manner which excludes interests external to that community.[32] For example, multinational corporations may prioritise their shareholders (in profits) above impacted stakeholders, just as local communities may seek to prioritise the local environment at the expense of the regional environment. Contrastingly, too much centralisation at the regional level is likely to stifle innovation at the local level and could lead to community disenfranchisement with political order. However, such challenges can be better controlled by meta-regulation which seeks to harness the regulatory power of communities in a co-regulatory framework (see Chapter 9).

Many other challenges with the transnational approach need to be subject to future research in the context of UCH protection and ocean management. For example, a major limitation on the use of external agencies and actors is the challenge of funding.[33] Given that the state can effectively fund the production of public goods with the use of taxation, there is a need for more creative and mutually beneficial solutions in order to establish and sustain global, regional, and community-level governors, such as by monetising cultural and ecosystem services.[34] In the case of UCH, it is possible to see NGOs providing consultancy work, seeking donations, or charging membership fees, in order to fund their work; but state financial backing still appears necessary to effect actual change at regional and global levels.[35] However, there need not be sole reliance on commitment from public authorities. If enough transnational actors can collectivise together within a

[30] Kotzé, L.J., (2012), 'Arguing Global Environmental Constitutionalism', 1(1) Transnational Environmental Law 199-233, at p. 222; Bierman, F., (2007), 'Reforming Global Environmental Governance: From UNEP Towards a World Environment Organization', in *Global Environmental Governance: Perspectives on the Current Debate*, L. Swart and E. Perry (Eds.), 103-123, Center for UN Reform Education (New York); Meyer-Ohlendorf, N. and Knigge, M., (2007), 'A United Nations Environment Organization', in *Global Environmental Governance: Perspectives on the Current Debate*, L. Swart and E. Perry (Eds.), 124-141, Center for UN Reform Education (New York).
[31] Supra n. 4, Eckerberg and Joas, at p. 411.
[32] Brousseau, E. and Dedeurwaerdere, T., (2012), 'Global Public Goods: The Participatory Governance Challenges', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 21-36, MIT Press (Cambridge, MA), at p. 24.
[33] Kilby, P., (2006), 'Accountability for Empowerment: Dilemmas Facing Non-Governmental Organizations', 34(6) *World Development* 951-963; Parks, T., (2008), 'The Rise and Fall of Donor Funding for Advocacy NGOs: Understanding the Impact', 18(2) *Development in Practice* 213-222.
[34] OECD, (2013), *Scaling-Up Finance Mechanisms for Biodiversity*, OECD Publishing (Paris).
[35] Ram, R., (2003), 'Roles of Bilateral and Multilateral Aid in Economic Growth of Developing Countries', 56(1) *Kyklos* 95-110; Addison, T., Mavrotas, G. and McGillivray, M., (2005), 'Aid, Debt Relief and New Sources of Finance for Meeting the Millennium Development Goals', 58(2) *Journal of International Affairs* 113-127, at pp. 118-119.

network, it is imminently possible to create well-funded organisations and regimes to achieve collective action towards network objectives without the need for state law.[36] Much global and regional level meta-governance should therefore also focus on the facilitation of such transnational networking.[37]

Another challenge with global governance outside the national level is that of coordination between overlapping regimes and the need for overall policy leadership.[38] The high level of polycentrism and decentralism across multiple orders provides for a more fragmented, complex, and unpredictable environment.[39] The use of a clearer multi-level structure, as set out in this chapter and elsewhere in the thesis, however, would provide some solution to this, in the form of clearer hierarchical coordination. Zürn also notes the higher-level coordination by foremost international organisations such as the United Nations and G20, although he rightly expresses concern regarding the priorities of these organisations and their lack of accountability.[40] Either way, the issue of regime overlap and fragmentation seems hardly insurmountable. As Molenaar noted as far back as 2004, it is increasingly possible to find regimes in the ocean governance context which directly address overlaps and coordination between one another.[41] Finally, another difficulty which has faced the integration of non-state actors into the governance framework has been obvious difficulties with intra- and inter-community management

[36] Dingwerth, K., (2008), 'Private Transnational Governance and the Developing World: A Comparative Perspective', 52(3) *International Studies Quarterly* 607-634; Hale, T. and Held, D. (Eds.), (2011), *Handbook of Transnational Governance: New Institutions and Innovations*, Polity Press (Malden, MA).
[37] See Chapter 9, Section 2; Abbott, K. W. and Snidal, D., (2009), 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in *The Politics of Global Regulation*, W. Mattli and N. Woods (Eds.), 44-88, Princeton University Press (Princeton).
[38] Biermann, F., Pattberg, P., Van Asselt, H. and Zelli, F., (2009), 'The Fragmentation of Global Governance Architectures: A Framework for Analysis', 9(4) *Global Environmental Politics* 14-40; Cafaggi, F. and Caron, D.D., (2012), 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium', 23(3) *European Journal of International Law* 643-649, at p. 645.
[39] Ibid; Fairbrass, J. and Jordan, A., 'Multi-Level Governance and Environmental Policy', in *Multi-Level Governance*, I. Bache and M. Flinders (Eds.), 147-164, Oxford University Press (Oxford), at pp. 151-152; Dreyer, M. and Sellke, P., (2015), 'The Regional Advisory Councils in European Fisheries: An Appropriate Approach to Stakeholder Involvement in an EU Integrated Marine Governance?', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 121-140, Routledge (Abingdon), at p. 135; International Law Commission, (2006), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, UN Doc. A/CN.4/L.682 13, at pp. 252-253; Stephenson, P., (2013), 'Twenty Years of Multi-Level Governance: 'Where Does it Come From? What is it? Where is it Going?', 20(6) *Journal of European Public Policy* 817-837, at p. 824.
[40] Supra n. 7, Zürn, at p. 740.
[41] For example, Molenaar refers to an example in Art. VI of the 1980 Convention on the Conservation of Antarctic Marine Living Resources, which acknowledges the supremacy of the International Whaling Commission, as well as in the Indian Ocean Tuna Commission's Resolution 98/03 'On Southern Bluefin Tuna', which acknowledges the primacy of the Commission for the Conservation of Southern Bluefin Tuna. (Molenaar, E.J., (2004), 'Unregulated Deep-Sea Fishing: A Need for a Multi-Level Approach', 19(3) *International Journal of Marine and Coastal Law* 223-246, at p. 232.

and conflict, with the resulting unpredictable and time-intensive decision-making which comes from highly reflexive and collaboration-driven approaches.[42] Nevertheless, many rightly suggest that most such conflicts between stakeholder groups are merely latent misunderstandings and a failure to communicate underlying interests, which collaborative processes could assist in unearthing and reappraising through a more transparent, inclusive, equitable, and forward-focused process.[43]

Importantly, all of these drawbacks are viewed more often as *necessary* governance challenges needing to be dealt with by the ongoing refinement of governing processes, rather than arguments against the need for a new global solution beyond inter-state law.[44] Future global governance research in the context of UCH might therefore seek to empirically examine – in more detail than has been possible in the space of this thesis – the key non-state actors and multi-level regimes operating in the framework and, in particular, the manner in which their accountability, democratic legitimacy, representativity, funding, stability, predictability, transparency, efficiency, coordination, power, and enforcement capacity, can all be improved according to effective governance principles.[45] Much of this is beyond the aims of the immediate study, which has been solely to evaluate the potential opportunities and advantages derived by taking a multi-level and transnational approach to UCH protection, beyond the struggling system of marine environmental governance.

In most cases, however, it is difficult to tell whether objections by scholars and experts to the idea of expanding into processes beyond a horizontal state-based system is simply the perceived political and practical challenges of such an approach, rather than any

[42] See Chapter 9; Supra n. 39, Dreyer and Sellke, at pp. 135-136.
[43] Conzelmann, T., (2008), 'A New Mode of Governing? Multi-Level Governance between Cooperation and Conflict', in *Multi-Level Governance in the European Union: Taking Stock and Looking Ahead*, T. Conzelmann and R. Smith (Eds.), 11-30, Nomos Verlagsgesellschaft (Baden-Baden); McDougall, C. and Banjade, M.R., (2015), 'Social Capital, Conflict, and Adaptive Collaborative Governance: Exploring the Dialectic', 20(1) *Ecology and Society* 44-66; Ansell, C. and Gash, A., (2008), 'Collaborative Governance in Theory and Practice', 18(4) *Journal of Public Administration Research and Theory* 543-571, at p. 553.
[44] Jentoft, S. and Knol, M., (2014), 'Marine Spatial Planning: Risk or Opportunity for Fisheries in the North Sea?', 12(1) *Maritime Studies* 13-28, at p. 14; 'Global governance is something that happens; no one, apparently, actually does it. [It] is the result of a political process and is shaped by power, access, mobilization, leadership, and other political variables.' (Avant, D.D., Finnemore, M. and Sell, S.K., (2010), 'Who Governs the Globe?', in *Who Governs the Globe?*, D.D. Avant, M. Finnemore and S.K. Sell (Eds.), 1-34, Cambridge University Press (Cambridge), at p. 7).
[45] Supra n. 28, Edwards and Zadek, at pp. 200-213; Supra n. 12, Bederman, at p. 171; MacDonald, T., (2008), *Global Stakeholder Democracy: Power and Representation Beyond Liberal States*, Oxford University Press (Oxford); Korten, D.C., (1994), *Getting to the 21st Century: Voluntary Action and the Global Agenda*, Kumarian Press (Sterling, VA), at p. 201.

reflection of its potential merits.[46] For example, in the context of regional marine spatial planning (see Chapter 9), while the European Commission stressed the multi-sectoral and stakeholder-driven motivations for using the transnationalising process, as well as the eventual need for joint processes of enforcement, it was forced to accept that the ultimate '[d]ecision-making competence in this area lies with the Member States.'[47] Similarly, a report on marine spatial planning in 2011 felt that, to be effective, 'transboundary consultation and coordination procedures would need to be mandatory and implemented through appropriate mechanisms for joint decision-making and conflict resolution.'[48]

When evaluating the Transboundary Planning in the European Atlantic Project, Jay et al also had to concede marine spatial planning 'is unlikely to lead to a joint plan, but should offer effective links between national MSP processes'.[49] For example, in interview, de Vrees felt that there was never going to be a single (multinational) marine plan for a sea basin, such as the North Sea. However, when asked whether this was necessarily the best option, he agreed that 'there would be a better solution if you do it differently' and that there is an alternative 'optimum solution', including co-building offshore infrastructure.[50] In other words, while it may be true that a multi-level and multi-actor process may be preferable, it is the practical and political feasibility of achieving such transnational regimes which makes the development of such integrated governance more difficult for the time being. As Barnes rightly put it in 2016, the 'need for greater integration between different sectoral activities is generally recognized, but remains a significant challenge in a decentralized legal system.'[51]

(b) State Law with Non-State Law: The 'Transnational' Approach

The previous section demonstrated that it is not a binary question about which is preferable between state-based and non-state-based law, but can depend on what is the

[46] E.g., Flannery, W., O'Hagan, A.M., O'Mahony, C., Ritchie, H. and Twomey, S., (2014), 'Evaluating Conditions for Transboundary Marine Spatial Planning: Challenges and Opportunities on the Island of Ireland', 51 *Marine Policy* 86-95, at pp. 88-89.
[47] European Commission, (2007), *An Integrated Maritime Policy for the European Union*, 10 October 2007, COM (2007) 575 Final, at p. 6.
[48] Cameron, L., Hekkenberg, M. and Veum, K. (Eds.), (2011), *Transnational Maritime Spatial Planning: Recommendations*, Seanergy 2020 (Bruseels), at p. 41.
[49] Jay, S., Alves, F.L., O'Mahony, C., Gomez, M., Rooney, A., Almodovar, M., Gee, K., de Vivero, J.L.S., Gonçalves, J.M., da Luz Fernandes, M., Tello, O., Twomey, S., Prado, I., Fonseca, C., Bentes, L., Henriques, G. and Campos, A., (2016), 'Transboundary Dimensions of Marine Spatial Planning: Fostering Inter-Jurisdictional Relations and Governance', 65 *Marine Policy* 85-96, at p. 87.
[50] De Vrees, L., (2018), Interview with Leo De Vrees, 21 March 2018, Transcript on File.
[51] Barnes, R., (2016), 'The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law', 31(4*) International Journal of Marine and Coastal Law* 583-619, at p. 596.

most suitable 'level' at which particular collective action challenges should be addressed, as well as the various elements, stakeholders and systems implicated at different stages. In other words, one should view effective transnational governance as requiring a mix of multiple-level law and systems. As was also argued in Chapter 6, while this polycentricity may breed complexity, it is possible to coordinate such regimes effectively through overlapping and integrating hierarchised networks that are coordinated across global-regional-national-local scales. This is where integrated ocean management (IOM), as also highlighted in Chapter 6, has begun to be pitched as a new multi-level paradigm for ocean governance. There it was shown that IOM represents a call for a transnational (multi-level and multi-stakeholder) approach to protecting the marine environment.

However, while some writers have seen IOM as an aspirational framework which can be incorporated within the national-level system for managing the seas under the LOSC, most still recognise that IOM and national-level regulation can and should be interoperating symbiotically. For example, leading authorities on the law of the sea, such as Harrison,[52] Rothwell, Oude Elferink, Scott and Stephens,[53] have maintained the essential respect for the central function of national-level law in ocean governance. Indeed, Barnes also appears to limit the notion of IOM to a 'broad policy objective' within the implementation of the LOSC, recognising the ongoing centrality of inter-state relations in the law of the sea.[54] However, others have also promoted the view that, while the national-level 'constitution' under the LOSC provides an important level of stability, familiarity, and equity within a negotiated system for the inter-national allocation of the ocean's wealth, the *very purpose* of IOM is to overcome the abject failures of the inter-state LOSC framework to provide for long-term sustainable ocean management where such failure points occur.[55] In other words, the vision appears to be closer to Tanaka's

[52] Harrison, J., (2017), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford University Press (Oxford).
[53] Rothwell, D.R., Oude Elferink, A.G., Scott, K.N. and Stephens, T., (2015), 'Charting the Future of the Law of the Sea', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 888-912, Oxford University Press (Oxford), at p. 899.
[54] Barnes, R., (2012), 'The Law of the Sea Convention and Integrated Regulation of the Oceans', 27(4) *International Journal of Marine and Coastal Law* 859-866, at p. 859.
[55] E.g., Allott, P., (1992), 'Mare Nostrum: A New International Law of the Sea', 86(4) *American Journal of International Law* 764-787; Freestone, D., Johnson, D., Ardron, J., Morrison, K.K. and Unger, S., (2014), 'Can Existing Institutions Protect Biodiversity in Areas Beyond National Jurisdiction? Experiences from Two On-Going Processes', 49 *Marine Policy* 167-175, at p. 174; Scott, K.N., (2015), 'Integrated Oceans Management: A New Frontier in Marine Environmental Protection', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 463-490, Oxford University Press (Oxford), at p. 489.

'dual' model of IOM introduced in his insightful 2008 monograph, which argued that both an *integrated* and *zonal* approach to ocean management could run in a parallel and dialectical relationship (with "zonal" referring to the strict boundaries between national territorial jurisdiction as inherent under Westphalianism).[56]

The future constitutional role of the LOSC under such a hybrid governance model – between integration and zonality – is an intriguing question worthy of future analysis.[57] It certainly seems possible, in line with the views of each Barnes, Harrison, and Rothwell et al, above, that the negotiation of inter-state rights and responsibilities can still provide an important constitutional undergirding to the broader integrated model. An example of this hybridity can be found in one of the foremost accounts of IOM, wherein Scott regarded it as 'multi-sectoral', 'spatially-focused', carrying a 'strong temporal dimension', while also necessitating 'a relatively high level of political, legal, and institutional coordination at all levels of implementation including meaningful stakeholder participation.'[58] This more popular view, thus, seems to focus upon a co-productive relationship between zonality and integration, initially at least, with the integrated system eventually superseding the LOSC in the long-term.[59] In this way, it must be understood that transnational law and governance are a *complement*, rather than *substitute*, for traditional international and national legal processes, with the purpose of *enhancing* the traditional national-level legal system, rather than *replacing* it.

3. National-Level Governance and Underwater Cultural Heritage

As explored in the previous chapter on regional-level governance, there is a widespread view among many in the UCH and heritage community that ratification and expansion of the UNESCO Convention should be the single focus for improving the global protection of UCH. As Williams put it in interview, the UNESCO Convention has become 'something of a Holy Grail' in the UCH community, which has led many key policy

[56] Tanaka, Y., (2008), *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea*, Routledge (Abingdon), at p. 17.
[57] See Chapter 10; C.f., Supra n. 21, Gavouneli. It is interesting to note that, during interview, Williams was of the opinion that a new Law of the Sea Convention will be negotiated in the near future (Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File).
[58] Supra n. 55, Scott, at p. 466.
[59] United Nations General Assembly, (2008), *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction: Letter dated 15 May 2008 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, 16 May 2008, UN Doc. A/63/79, at paras. 44 and 54.

experts to 'become blinded' to other alternatives and to solely focus on its ratification.[60] Guérin also expressed the widespread view that regional treaties are a distraction away from the UNESCO Convention, which should be the main focus.[61] However, it has also been highlighted that regional-level treaties and international treaties are not mutually exclusive and that regionalism can often actually assist in promoting the implementation and success of multilateral frameworks.

Certainly, there is no harm in also maintaining the 'zonal' system of ocean law, as instituted under the helm of Westphalianism. Coastal states should continue to regulate specific marine matters within their internal, territorial, archipelagic, contiguous, exclusive economic, and continental shelf zones. The UNESCO Convention instead provides a useful statement of where their initial powers of jurisdiction can be found and, from this baseline, where such sovereign power can be further constrained and contested by other competing regimes within or without the inter-national legal order. For example, while the UNESCO Convention leaves coastal states to regulate UCH in their internal, territorial and archipelagic waters exclusively;[62] it does so under the proviso that all states must 'cooperate' in the protection of UCH,[63] prevent harm to UCH from incidental threats[64] and, importantly, that the exclusive freedom of states within these waters continues to remain '[w]ithout prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage',[65] wherein states are '*encouraged* to enter into bilateral, regional or other multilateral agreements or develop existing agreements . . . which would ensure *better protection* of underwater cultural heritage than those adopted in this Convention.'[66]

In other words, exclusive sovereign powers of regulation over UCH should only be exclusive sovereign powers to the extent that they provide effective global protection; otherwise, alternative regimes should be used to constrain and limit self-centred uses of sovereign power through a model of active cooperation and regime building and thickening, as argued in Chapter 3. This means that the unceasing and inevitable jurisdictionalisation of UCH across coastal states' EEZs and continental shelves, which

[60] Supra n. 57, Williams.
[61] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File.
[62] Supra n. 1, UNESCO Convention, Art. 7.
[63] Supra n. 1, UNESCO Convention, Art 2(2).
[64] Supra n. 1, UNESCO Convention, Art. 5.
[65] Supra n. 1, UNESCO Convention, Art. 7(2).
[66] Supra n. 1, UNESCO Convention, Art 6(1).

is being witnessed as a widespread customary phenomenon both before and after the UNESCO Convention, should matter less in effect, given that any such jurisdiction is provided conditionally upon its further constraint in the interests of the international community and future generations. New forms of international legal liability may therefore need to reside where a state has been passive or inactive in developing meaningful and effective multiple-level regimes.

Chapter 3 used the gradual thickening of fisheries regimes as an example of stronger levels of active, rather than passive, transnational cooperation. Here, although states are entitled to exclusive rights over living resources up to 200-nautical miles offshore, the recognised need for cooperation to protect external interests has driven forward numerous multilateral, supranational, and transnational norms which constrain this exclusivity and ensure that states minimise self-centred decisionmaking over shared fish stocks and ecosystems.[67] Admittedly, even after decades of concerted effort, such systems of cooperation are still a work-in-progress,[68] but it is certainly possible to reserve praise for many of the developments and improvements. As one example, the Common Fisheries Policy – working in fruitful co-production with regional fisheries management organisations and other national-level policies – has received considerable credit for reviving North Sea cod stocks.[69] Put another way, the UNESCO Convention just sets the initial agreed boundaries between states; which can be continually tempered and contorted by subsequent conflicting and overlapping regimes and systems of norms.

As Kern and Gilek said recently in reference to the rapid supranationalisation and transnationalisation of European marine space, 'national environmental governance systems are still the backbones of regional environmental governance'.[70] This same perspective applies to the UNESCO Convention where, as Leshikar-Dention puts it, states continue to be 'principal players' in achieving UCH protection.[71] Finally, as noted and perhaps most critically of all, the UNESCO Convention also provides an invaluable commitment between states to implement the Annexed Rules, which sets a common

[67] See Chapter 3, Section 4.
[68] E.g., Supra n. 51, Barnes, pp. 592-594.
[69] Fernandes, P.G. and Cook, R.M., (2013), 'Reversal of Fish Stock Decline in the Northeast Atlantic', 23(15) *Current Biology* 1432-1437.
[70] Kern, K. and Gilek, M., (2015), 'Governing Europe's Marine Environment: Key Topics and Challenges', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 1-12, Routledge (Abingdon), at p. 3.
[71] Leshikar-Denton, M.E., (2010), 'Cooperation is the Key: We Can Protect the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 85-95, at p. 89.

baseline for the treatment of UCH and its future management.[72] As Williams rightly suggested in interview, states such as the United Kingdom and Norway have effectively adopted 98% of the Convention by agreeing to apply the Rules to the future management of UCH.[73] Efforts to achieve its widespread ratification and implementation should therefore continue in conjunction with considerably greater efforts at expanding other regimes – whether bilateral, multilateral, supranational, or transnational – whenever needed across all other levels.

4. Conclusion: A National Governance Approach to the Protection of Underwater Cultural Heritage

This chapter has provided a succinct, yet vital, defence of national sovereignty and the future role of international law in producing global public goods and addressing the common concerns of humankind. As national-level law has been addressed in most other literature; and national-level governance has been critiqued in all the other chapters across this thesis; this chapter was necessarily to-the-point and focused on picking up several loose threads from the arguments taken in the study. The evidence produced in this chapter therefore proposes that, while the overarching argument of this thesis is that national level regulation – i.e., national law, private international law, and public international law – should not be the exclusive means to produce global public goods, such as UCH protection; neither should global, regional, and community-level approaches be exclusive of the national. Instead, the national level will remain the most critical and essential level for expanding norms and systems across the other levels and for providing a vitally important democratic 'legitimiser' of the migration of such norms. As the concluding chapter explores further, and in some paradoxical sense, increasing cooperation between states at the national level – in the form of widespread ratification of the UNESCO Convention – would actually enhance and hasten the development of other multilateral, supranational and transnational regimes across the multiple-level mix. Nevertheless, ratification should not be seen as the sole pathway to such supranational and transnational regimes, with both forces interacting and strengthening each other.[74]

[72] Supra n. 57, Williams; Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File; Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File.
[73] Supra n. 57, Williams.
[74] See Chapter 10.

Many challenges are inherent with the actual achievement of this, as has been highlighted throughout this thesis, such as a present thrust in many sections of the world to "take back control" of national sovereignty and to eschew the influence of interests outside traditional political boundaries. However, this desire to maintain the Westphalian fiction in absolute totality is not an argument about which approach is, practically speaking, better for producing global public goods or addressing common concerns of humankind. It is perhaps better framed as a yearning for community enfranchisement, a maintenance of national or native traditions, and a fear of cultural heterogeneity. This does not, unfortunately, change the reality that global and regional solutions are frankly needed to address all public goods having spillover effects. The following chapter will therefore examine the final 'community' level in the multiple-level mix, which will reach beyond the concept of global and regional cooperation and, instead, focus on the decentralisation and delegation of governance and influence to communities. Chapter 10 then concludes by drawing together the findings and arguments proffered throughout this thesis. It also demonstrates that, as noted, the national level and transnational level are mutually supporting concepts and the ratification of the UNESCO Convention would equally serve to support the attainment of a multiple-level approach.

Chapter 9

A Community Governance Approach to Protecting Underwater Cultural Heritage

Chapter Abstract:

This final chapter exploring the multi-level governance approach to UCH protection focuses on the community level of governance. By understanding community-level governance through a more inclusive definition of "communities" – seeing them as local, regional, global, and transnational in nature – the chapter provides further evidence of the benefits of improving stakeholder-inclusivity at all levels when addressing global public goods. First exploring the weaknesses of top-down and market-based regulation, it highlights Ostrom's famous appeal for greater community self-regulation and the numerous strengths and benefits that communities have in developing and enforcing internal rules, particularly with regard to reflexive issues such as environmental and cultural heritage protection. It also highlights how meta-regulation can provide a fertile ground and suitable framework for such community systems to flourish and prosper. It then applies all this to the context of UCH protection, demonstrating that there are numerous examples and case studies highlighting how community 'buy-in', incentivisation and self-governance have led to effective protection in lieu of top-down law. In the case of self-governance, this is tested by looking specifically at transboundary marine spatial planning and exploring whether its central value in protecting UCH lies in its capacity to facilitate community-level rules and systems. Overall, the findings provide evidence that stakeholder networks or 'communities' – whether operating publicly, privately, locally or transnationally – can create and enforce rules which provide an important level of additional protection for UCH by sidestepping some of the weaknesses of positivist or national law.

1. Overcoming the Limits of Top-Down and Market-Based Regulation

The following chapter takes a slightly different approach to resolving the weaknesses of the Westphalian system in protecting UCH. Whereas Chapters 6 to 8 were focused on the types of cooperation *outside* of the state, in a multi-level frame, including international treaties such as the UNESCO 2001 Convention on the Protection of the Underwater

Cultural Heritage (UNESCO Convention)[1] and the UN 1982 Convention on the Law of the Sea (LOSC);[2] this chapter looks at cooperation from *within* the state, at the stakeholder level. It is therefore focused more upon the advantages of taking a multi-stakeholder approach. It does this by exploring the numerous weaknesses which can arise by relying solely on 'top-down' governance in order to manage complex and reflexive challenges such as cultural heritage and environmental protection. Relying on interview feedback, as well as relying on secondary literature to draw in numerous examples around the world, it argues that communities can be utilised very effectively using models of self-regulation or co-regulation. This resolves many of the weaknesses highlighted in Chapters 3 to 5, particularly in relation to scarcity of public resources and difficulties with the responsiveness of regulation to transnational fragmentation and complexity. It concludes by highlighting examples of where collaborative governance and transboundary marine spatial planning could assist in effectively achieving community empowerment in the protection of UCH.

The community governance level, which centres upon an increased regulatory role for *communities* of stakeholders – whether such communities are local/transnational, homogenous/heterogeneous, private/public/hybrid – addresses demands for intensive multi-stakeholderisation of environmental and cultural heritage law. It expands particularly upon the research of Nobel prize-winning economist Elinor Ostrom published in 1990, which was widely regarded as 'groundbreaking' evidence of the capacity of communities to more effectively and sustainably manage their own resources independently.[3] Breaking from the pessimistic depiction of all humankind as self-interested decision-makers, as was central to Garrett Hardin's famous 1968 hypothesis on the 'Tragedy of the Commons', Ostrom's work showed that even rationally-oriented communities – where they possess a number of qualities which enables them to self-govern – can self-organise in the governance of commons more effectively than is

[1] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.
[2] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.
[3] Wilson, D. S., Ostrom, E. and Cox, M. E., (2013), 'Generalizing the Core Design Principles for the Efficacy of Groups', 90 *Journal of Economic Behavior and Organization* 521-532, at p. 522. See, e.g., Ostrom, E., (1990), *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press (Cambridge), and subsequent work. For legal literature, see Weston, B.H. and Bollier, D., (2013), *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press (Cambridge).

possible by top-down regulation alone.[4] The recognised capacity of communities to reflexively manage numerous competing, overlapping and shifting stakeholder interests, has thus propelled forward the use of new governance forms – such as 'collaborative'[5] or 'new'[6] governance – as a third regulatory mechanism for achieving public objectives, beyond the limited capacities of 'command-and-control' and 'market-based' regulation.[7]

Command-and-control regulation, being our traditional *go-to* form of legal enforcement, is widely felt to be ineffective alone in achieving sustainable or environmentally protective behavioural patterns among stakeholders.[8] In particular, the constantly shifting and highly context-dependent patterns of stakeholder interactions and decision-making, makes the development of clear and predictable environmental rules which stakeholders can follow and understand highly challenging.[9] It is also difficult to develop firm legal rules which carry normativity, given the need for highly generalised principle-based rules which must be interpreted ad hoc.[10] This also compounds the difficulty of enforcement given the considerable challenges of detecting where rules have been breached and with compiling sufficient evidence to punish rulebreakers, leading to a costly system if it is to effectively detect breaches and distribute fair and accurate punishments.[11]

[4] Jillions, A., (2012), 'Commanding the Commons: Constitutional Enforcement and the Law of the Sea', Global Constitutionalism, 1(3), 429-454, at pp. 448-449; Brown Weiss, E., (2014), 'Nature and the Law: The Global Commons and the Common Concern of Humankind', in *Sustainable Humanity, Sustainable Nature: Our Responsibility*, Extra Series 41, Pontifical Academy of Sciences (Vatican City), at p. 10.
[5] Ansell, C. and Gash, A., (2008), 'Collaborative Governance in Theory and Practice', 18(4) *Journal of Public Administration Research and Theory* 543-571; Emerson, K. and Nabatchi, T., (2015), *Collaborative Governance Regimes*, Georgetown University Press (Washington DC); Donahue, J.D. and Zeckhauser, R.J., (2012), *Collaborative Governance: Private Roles for Public Goals in Turbulent Times*, Princeton University Press (Princeton).
[6] Rhodes, R.A.W., (1996), 'The New Governance: Governing without Government', XLIV *Political Studies* 652-667; Holley, C., Gunningham, N. and Shearing, C., (2011), *The New Environmental Governance*, Routledge (Abingdon); Lobel, O., (2012), 'New Governance as Regulatory Governance', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 65-82, Oxford University Press (Oxford); Salamon, L., (2002), 'The New Governance and the Tools of Public Action: An Introduction', in *The Tools of Government: A Guide to the New Governance*, L. Salamon (Ed.), 1-47, Oxford University Press (Oxford).
[7] Supra nn. 3-4.
[8] Supra nn. 5-7.
[9] Orts, E.W., (1995), 'A Reflexive Model of Environmental Regulation', 5(4) *Business Ethics Quarterly* 779-794, at p. 781; Aalders, M. and Wilthagen, T., (1997), 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment', 19(4) *Law & Policy* 415-443; Steinzor, R.I., (1998), 'Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control', 22(1) *Harvard Environmental Law Review* 103-202; Sinclair, D., 'Self-Regulation Versus Command and Control? Beyond False Dichotomies', 19(4) *Law & Policy* 529-559.
[10] Ibid; de Sadeleer, N., (2005), *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press (Oxford).
[11] Ibid; Supra n. 9, Sinclair, at p. 535.

Indeed, most domestic legal systems are limited in terms of the resources and processes they have available for implementation and enforcement.[12] Furthermore, in a transboundary marine context at least, not all actors who can impact on UCH are as effectively supervised by top-down rules posited by a distant national regulator.[13] Command-and-control regulation – which is dictated without accounting for true normative preferences or without offering an opportunity to shape the regulation – can therefore suffer from a considerable lack of community buy-in and social legitimacy.[14] In practice, this can mean that the rules are habitually flouted or disregarded, as was demonstrated quite dramatically in ocean space in Chapter 5.

The second form of regulation to address public good production, assisted into the mainstream by the Chicago School of Economics in the mid-20th Century, is by market-based mechanisms.[15] The capacity and efficiency of markets to swiftly modify behaviour and to achieve allocation of resources to near-Pareto preferences is phenomenal.[16] Unfortunately, however, market-based models are only effective in very specific factual contexts. In particular, any good which radiates abstract values that overspill to non-owners will be systematically underproduced on account of its perpetual undervaluation.[17] Furthermore, the need for public enjoyment of public goods – such as

[12] Barrett, S., (2007), *Why Cooperate?: The Incentive to Supply Global Public Goods*, Oxford University Press (Oxford), at pp. 190-191.
[13] See Chapters 3 to 5.
[14] Gunningham, N., (2009), 'The New Collaborative Environmental Governance: The Localization of Regulation', 36(1) *Journal of Law and Society* 145-166, at p. 167; Bodansky, D., (2012), 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' 23(3) *European Journal of International Law* 651-668 at p. 656; Rowat, D. and Engelhardt, U., (2007), 'Seychelles: A Case Study of Community Involvement in the Development of Whale Shark Ecotourism and its Socio-Economic Impact', 84(1) *Fisheries Research* 109-113, at p. 112.
[15] Coase, R.H., (1993), 'Law and Economics at Chicago', 36(1:2) *Journal of Law and Economics* 239-254; Mackaay, E. (2000), 'History of Law and Economics', 1 *Encyclopedia of Law and Economics* 65-117; Kitch, E.W., (1983), 'The Fire of Truth: A Remembrance of Law and Economics at Chicago: 1932-1970', 26(1) *Journal of Law and Economics* 163-234. Although, of course, concepts on the use of markets in regulation can perhaps be equally attributed to Adam Smith in the early 19th Century, among many others.
[16] Ackerman, F. and Gallagher, K., (2000), 'Getting the Prices Wrong: The Limits of Market-Based Environmental Policy', *Global Development and Environment Institute Working Paper*, No. 00-05 (Tufts University, MA); Ecorys, O., (2011), *The Role of Market-Based Instruments in Achieving a Resource Efficient Economy*, Report for the European Commission & DG Environment, Cambridge Econometrics and COWI (Rotterdam); Katsoulacos, Y. and Xepapadeas, A., (1996), 'Environmental Innovation, Spillovers and Optimal Policy Rules', in *Environmental Policy and Market Structure*, C. Carraro, Y. Katsoulacos and A. Xepapadeas (Eds.), 143-150, Kluwer Academic Publishers (Dordrecht); Kverndokk, S. and Rose, A., (2009), 'Externalities, Efficiency and Equity', 1 *JM Gowdy: Economics Interactions with Other Disciplines* 115-138.
[17] Ibid, Ackerman and Gallagher; Ibid, Katsoulacos and Xepapadeas; Peacock, A., (1978), 'Preserving the Past: An International Economic Dilemma', 2(2) *Journal of Cultural Economics* 1-11; Vadi, V., (2014), 'Public Goods, Foreign Investments and the International Protection of Cultural Heritage', in *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, F. Lenzerini and A.F. Vrdoljak (Eds.), 231-248, Hart (Oxford); c.f., Posner, E.A., (2007), 'International Protection of Cultural Property: Some Skeptical Observations', 8(1) *Chicago Journal of International Law* 213-232.

sustainable recreation, in situ research, aesthetic enjoyment, and access and benefit sharing of UCH – makes exclusive private dominion a highly unattractive model of management.[18] However, it is certainly feasible to argue that rules for public-oriented and in situ ownership, perhaps by local or transnational communities, could carry the capacity to effectively propertise UCH in a manner permitting public enjoyment (see Section 4 below).

Overall, therefore, governance research since the late 20th Century has increasingly pointed to community governance as an effective 'third option' to resolve situations when these first two mechanisms are ineffective.[19] Given that command-and-control and market-based regulation are particularly defective in the highly heterogenous, reflexive and contextual world of global environmental protection, community governance – or 'collaborative'[20] or 'new'[21] governance – could be viewed as a vital element of effective regulation for pressing environmental challenges such as climate change or, indeed, the protection of UCH. While collaborative governance no doubt has its challenges, which would be the subject of future research in the context of UCH; it must be understood as a necessity in certain contexts where traditional regulation fails.[22]

2. Community Governance as the "Third" Regulatory Mechanism

Within MLG research, the lower level here referred to as *community governance*, is more commonly referred to as the 'local', 'subnational', or 'stakeholder' level, all with slightly different emphases. However, 'community' is the preferred term of this study, given that this permits that self-governing communities need not be geographically distinct or homogenous (local); nor represented by subnational entities, such as councils or local government (subnational); and they will always represent stakeholders as individuals or collectives.[23] Self-governing communities can indeed come in a vast variety of forms: it

[18] Ibid; Shaffer, G.C., (2012), 'International Law and Global Public Goods in a Legal Pluralist World', 23(3) *European Journal of International Law* 669-693, at p. 683.
[19] Supra nn. 3-6; Supra n. 14, Gunningham; Sørensen, E. and Torfing, J., (2007), 'Introduction: Governance Network Research: Towards a Second Generation', in *Theories of Democratic Network Governance*, E. Sørensen and J. Torfing (Eds.), 1-21, Palgrave Macmillan (London).
[20] Supra n. 5.
[21] Supra n. 6.
[22] Bryson, J.M., Crosby, B.C. and Stone, M.M., (2015), 'Designing and Implementing Cross-Sector Collaborations: Needed *and* Challenging', 75(5) *Public Administration Review* 647-663; Perrings, C. and Gadgil, M., (2003), 'Conserving Biodiversity: Reconciling Local and Global Benefits', in *Providing Global Public Goods: Managing Globalization*, I. Kaul, P. Conceição, K. Le Goulven and R.U. Mendoza (Eds.), 532-555, Oxford University Press (Oxford), at pp. 535 and 543.
[23] MacDonald, T., (2008), *Global Stakeholder Democracy: Power and Representation Beyond Liberal States*, Oxford University Press (Oxford), at p. 84.

is possible to see a maritime economic sector, such as the fisheries or energy sectors, as a community; just as it is possible to see polycentric transnational networks of public and private actors across multiple sectors, all cooperating in the management of the same micro-regional sea basin, as a "community", albeit a transnational community. Thus, communities can be global, regional, national, or local, in spatial reach, and can range from homogenous to heterogeneous, in complexion. In many ways, therefore, community governance could also be what others have termed 'network governance', where transnational communities represent issue-linked regulatory networks.[24] It can be implicated across all of the global, regional and national scales, but it is characterised by the everyday interactions of actual persons, organisations and stakeholders. As such, the research in this chapter is complementary to and continues the work undertaken in Chapter 6, which sought to explore options and potential benefits of expanding stakeholderisation of UCH protection at the global level.

Ostrom's work found that communities could be particularly effective at sustainably managing a shared commons, such as fish stocks or grazing lands.[25] This well-timed research thus joined forces with the global governance revolution, ultimately leading to the worldwide expansion of research into co-management or collaborative governance approaches to achieving community sustainability.[26] Social scientific research in this area – empirically exploring the various factors which improve a community's capacity for effective self-governance and the role of public authorities in meta-governance – has

[24] Hale, T. and Held, D., (2011), *Handbook of Transnational Governance: New Institutions and Innovations*, Polity Press (Cambridge); Supra n. 19, Sørensen and Torfing; Andonova, L.B., Betsill, M.M. and Bulkeley, H., (2009), 'Transnational Climate Governance', 9(2) *Global Environmental Politics* 52-73; Kern, K. and Bulkeley, H, (2009), 'Cities, Europeanization and Multi-Level Governance: Governing Climate Change through Transnational Municipal Networks', 47(2) *Journal of Common Market Studies* 309-332; Henriksen, L.F. and Ponte, S., (2018), 'Public Orchestration, Social Networks, and Transnational Environmental Governance: Lessons from the Aviation Industry', 12(1) *Regulation & Governance* 23-45.

[25] Supra n. 3. See also, Ostrom, E., (2012), 'Nested Externalities and Polycentric Institutions: Must We Wait for Global Solutions to Climate Change before Taking Action at Other Scales?', 49(2) *Economic Theory Journal* 353–369.

[26] Jentoft, S., (1989), 'Fisheries Co-Management: Delegating Government Responsibility to Fishermen's Organizations', 13(2) *Marine Policy* 137-154; Singleton, S., (2000), 'Co-Operation or Capture? The Paradox of Co-Management and Community Participation in Natural Resource Management and Environmental Policy-Making', 9(2) *Environmental Politics* 1-21; Berkes, F., (2009), 'Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning', 90(5) *Journal of Environmental Management* 1692-1702; Koontz, T.M., Steelman, T.A., Carmin, J., Korfmacher, K.S., Moseley, C. and Thomas, C.W., (2010), *Collaborative Environmental Management: What Roles for Government?*, Routledge (Abingdon); Armitage, D., Berkes, F. and Doubleday, N. (Eds.), (2010), *Adaptive Co-Management: Collaboration, Learning, and Multi-Level Governance*, UBC Press (Vancouver); Goss, S., (2001), *Making Local Governance Work: Networks, Relationships and the Management of Change*, Palgrave (Basingstoke); Rydin, Y., (2006), *Networks and Institutions in Natural Resource Management*, Edward Elgar (Cheltenham); Weber, E.P., (2003), *Bringing Society Back in: Grassroots Ecosystem Management, Accountability, and Sustainable Communities*, MIT Press (Cambridge, MA).

therefore proliferated in the space of two decades.[27] Numerous case studies and experiments have verified that internal enforcement mechanisms among communities, such as reputational pressures or the threat of ostracism, can drive up compliance with regulatory norms.[28] In addition to ostracism, suspension, and loss of reputation, the capacity for creative use of resources and self-organisation makes communities capable of devising unique internal enforcement mechanisms. An illustrative example has perhaps been the capacity of online social networks to develop mechanisms for achieving public objectives, such as by suspending user accounts, modifying search rankings, or adopting ratings systems.[29] Communities are thus inherently creative in their use of resources and in their capacity to problem-solve in a manner which utilises their own resources and capabilities efficiently. Their familiarity with each participant's potential contribution, along with their aptitude for reflexively making use of the various resources made available to them at different times, and their ability to seek mutually beneficial solutions when faced with complex social contexts, can therefore make them suitably adaptive and effective governors.[30]

Through its capacity for more frequent and detailed interactions between members, community regulation is also inherently more suited to developing rules and systems to

[27] Bell, S. and Park, A., (2006), 'The Problematic Metagovernance of Networks: Water Reform in New South Wales', 26(1) *Journal of Public Policy* 63-83; Gillespie, A., (2012), 'Science, Values and People: The Three Factors that Will Define the Next Generation of International Conservation Agreements', 1(1) *Transnational Environmental Law* 169-182, at p. 179; Supra n. 3, Weston and Bollier; Bell, S. and Hindmoor, A., (2009), *Rethinking Governance: The Centrality of the State in Modern Society*, Cambridge University Press (Cambridge).

[28] Milgrom, P., North, D. and Weingast, B., (1990), 'The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs', 1 *Economics and Politics* 1–23; Brousseau, E. and Dedeurwaerdere, T., (2012), 'Global Public Goods: The Participatory Governance Challenges', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 21-36, MIT Press (Cambridge, MA), at p. 31; Masten, S.E. and Prüfer, J., (2014), 'On the Evolution of Collective Enforcement Institutions: Communities and Courts', 43(2) *Journal of Legal Studies* 359-400.

[29] Lievens, E. and Valcke, P., (2012), 'Regulatory Trends in a Social Media Context', in *Routledge Handbook of Media Law*, M.E. Price, S. Verhulst and L. Morgan (Eds.), 557-580, Routledge (Abingdon); Bakos, Y. and Dellarocas, C., (2011), 'Cooperation Without Enforcement? A Comparative Analysis of Litigation and Online Reputation as Quality Assurance Mechanisms', 57(11) *Management Science* 1944-1962; Bederman, D.J., (2008), *Globalization and International Law*, Palgrave Macmillan (London), at pp. 85-86; Galves, F., (2009), 'Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient and Secure', 2009(1) *University of Illinois Journal of Law Technology & Policy* 1-68, at pp. 62-66.

[30] Baber, W.F. and Bartlett, R.V., (2015), *Consensus and Global Environmental Governance: Deliberative Democracy in Nature's Regime*, MIT Press (Cambridge, MA); Gollagher, M. and Hartz-Karp, J., (2013), 'The Role of Deliberative Collaborative Governance in Achieving Sustainable Cities', 5(6) *Sustainability* 2343-2366; Weymouth, R. and Hartz-Karp, J., (2015), 'Deliberative Collaborative Governance as a Democratic Reform to Reolve Wicked Problems and Improve Trust', 17(1) *Journal of Economic and Social Policy* No. 4; Kingsbury, B., (2008), 'Global Environmental Governance as Administration: Implications for International Law', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 63-84, Oxford University Press (Oxford), at pp. 68-69.

overcome collective action weaknesses.[31] It therefore becomes possible to empower stakeholders and provide a self-repeating pattern of cognisance of legal norms and compliance.[32] This adaptability also makes regulation more responsive than command-based or market-based systems to the constant, dynamic changes in the regulatory environment.[33] Further, by necessarily having a role in the day-to-day management or utilisation of a resource, such as by being local residents or consumers or producers, communities make suitable monitors, reporters and enforcers against rule-breaking and free riding.[34] This includes reporting suspicious or flagrant activities of community members and non-members who may be visiting or making use of a shared commons.

Stakeholder-led regulation which permits various public and private representatives to group together, explain their collective preferences and interests, and then jointly seek optimum solutions, are also likely to enjoy a vastly higher level of community buy-in and sense of social legitimacy.[35] Thus conferring an improvement in compliance at the critical stakeholder level.[36] As Gillespie has put it, the 'the justification for including

[31] Supra nn. 3-6; Zadek, S., (2006), 'The Logic of Collaborative Governance: Corporate Responsibility, Accountability, and the Social Contract', *Corporate Social Responsibility Initiative Working Paper*, No. 17, Harvard University (Cambridge, MA); Moura, P.T. and Chaddad, F.R., (2012), 'Collective Action and the Governance of Multistakeholder Initiatives: A Case Study of Bonsucro', 12(1) *Journal on Chain and Network Science* 13-24.

[32] Supra n. 30, Kingsbury, at p. 71; Supra n. 18, Shaffer, at pp. 686-687.

[33] Chaffin, B.C., Gosnell, H. and Cosens, B.A., (2014), 'A Decade of Adaptive Governance Scholarship: Synthesis and Future Directions', 19(3) *Ecology and Society* 56-68; Supra n. 22, Perrings and Gadgil, at pp. 535-536; Englender, D., Kirschey, J., Stöfen, A. and Zink, A., (2014), 'Cooperation and Compliance Control in Areas Beyond National Jurisdiction', 49 *Marine Policy* 186-194, at p. 187; Armstrong, J. H. and Kamieniecki, S., (2017), 'Strategic Adaptive Governance and Climate Change: Policymaking during Extreme Political Upheaval', 9(7) *Sustainability* 1244-1262.

[34] Alexander, S.M., Epstein, G., Bodin, Ö., Armitage, D. and Campbell, D., (2018), 'Participation in Planning and Social Networks Increase Social Monitoring in Community-Based Conservation', 2018 *Conservation Letters* 12562; Lawrence, A., (2010), *Taking Stock of Nature: Participatory Biodiversity Assessment for Policy, Planning and Practice*, Cambridge University Press (Cambridge); Johnson, N., Alessa, L., Behe, C., Danielsen, F., Gearheard, S., Gofman-Wallingford, V., Kliskey, A., Krümmel, E.M., Lynch, A., Mustonen, T. and Pulsifer, P., (2015), 'The Contributions of Community-Based Monitoring and Traditional Knowledge to Arctic Observing Networks: Reflections on the State of the Field', 1 *Arctic* 28-40; Abbot, J. and Guijt, I., (1998), *Changing Views on Change: Participatory Approaches to Monitoring the Environment*, International Institute for Environment and Development (London); Supra n. 29, Bederman, at pp. 75-78.

[35] Supra n. 5, Emerson and Nabatchi, at pp. 64-68; Cashore, B., (2002), 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority', 15(4) *Governance: An International Journal of Policy, Administration, and Institutions* 503-529; Supra n. 27, Gillespie, at p. 179; c.f., Sandström A., Crona B. and Bodin, Ö., (2013), 'Legitimacy in Co-Management: The Impact of Preexisting Structures, Social Networks and Governance Strategies', 24(1) *Environmental Policy and Governance* 60-76; c.f., Scott, C., Cafaggi, F. and Senden, L., (2011), 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', 38(1) *Journal of Law and Society* 1-19.

[36] Ibid; Slaughter, A-M., (2004), 'International Relations Theory and International Law: A Prospectus', in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, E. Benvenisti and M. Hirsch (Eds.), 16-49, Cambridge University Press (Cambridge), at pp. 46-47; Supra n. 4, Brown Weiss, at p. 11; Papanicolopulu, I., (2012), 'The Law of the Sea Convention: No Place for Persons?', 27(4) *International Journal of Marine and Coastal Law* 867-874, at p. 872; Bodansky, D., Brunnée J. and Hey,

local communities in conservation is not merely philanthropic. It is also self-interested, since one of the most important factors for long-term success in conservation is having the buy-in of affected . . . populations.'[37] In empirically examining this high compliance by community buy-in, for example, Mitchell has found that compliance by *stakeholders* with oil pollution laws in two international regimes was greater in the more stakeholder-inclusive regime, despite both regimes being comparable in terms of compliance by *states*.[38] What is more, if private communities can be trusted to self-craft rules, transaction costs can be minimised and rules can be designed in a manner making them easier to implement, as well as suited to the individual interests of community members, and in a familiar format which is easier to understand.[39]

Achieving community buy-in is critical to the achievement of cultural heritage protection, wherein the resources, tools, daily engagement and close proximity of local communities makes them truly invaluable as "partners" in the protection of our global heritage.[40] Francesco Bandarin, Director of UNESCO's World Heritage Centre, landed upon the issue when he said that 'without the understanding and support of the public at large, without the respect and daily care of the local communities, which are the true custodians of World Heritage, no amount of funds or army of experts will suffice in protecting the sites'.[41] In the context of archaeological resources, for example, Soto once discussed the invaluable role played by the local community and even ex-treasure hunters, in achieving protection and ecotourism at archaeological sites in Latin America.[42] Numerous other examples increasingly arise from studies and literature on heritage management which

E., (2008), 'International Environmental Law: Mapping the Field', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 1-28, Oxford University Press (Oxford), at p. 20.

[37] Supra n. 27, Gillespie, at p. 179.

[38] Mitchell, R.B., (1994), *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*, MIT Press (Cambridge, MA), at pp. 299–300.

[39] Gunningham, N. and Rees, J., (1997), 'Industry Self-Regulation: An Institutional Perspective', 19(4) *Law & Policy* 363-414; Cafaggi, F. and Pistor, K., (2015), 'Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation', 9(2) *Regulation & Governance* 95-107; Barzel, Y., (2002), *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State*, Cambridge University Press (Cambridge); Ogus, A., (1995), 'Rethinking Self-Regulation', 15(1) *Oxford Journal of Legal Studies* 97-108.

[40] Supra nn. 30 and 34; Chechi, A., (2015), 'Non-State Actors and Cultural Heritage: Friends or Foes?', 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 457-479, at pp. 474-475.

[41] UNESCO, (1999), *Twelfth General Assembly of States Parties to the Convention Concerning the Protection of World Natural and Cultural Heritage – Summary Record*, 8 November 1999 (Paris), UN Doc. WHC-99/CONF.206/7, at para. 20.

[42] Soto, A., (2006), 'Finding Solutions for Lost Cities: Indigenous Populations and Biological and Cultural Diversity', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 429-435, Cambridge University Press (Cambridge), at p. 430.

relate to the collaboration of local communities.[43] By its capacity to make integrated use of traditional practices, knowledge and innovation, such public-private integration also has numerous social benefits and puts a much greater value on cultural and indigenous diversity.[44] As is often said, therefore, while stakeholder-led governance is highly challenging and can take longer to reach agreed rules, the resulting quality of the norms and the high level of community buy-in makes the eventual implementation much more time-efficient and more effective overall.[45]

Naturally, the reliance upon communities to self-govern is not a panacea to global environmental governance. Indeed, many studies have stressed the practical challenges and risks inherent in using this form of regulation. For example, the high level of unpredictability and shifting contexts creates a considerable demand for constant

[43] International Journal of Heritage Studies, (2010), 'Heritage and Community Engagement: Collaboration or Contestation?', Special Issue (2010, Volume 16, Issue 1-2); Hodges, A. and Watson, S., (2000), 'Community-Based Heritage Management: A Case Study and Agenda for Research', 6(3) *International Journal of Heritage Studies* 231-243; Deacon, H. and Smeets, R., (2013), 'Authenticity, Value and Community Involvement in Heritage Management under the World Heritage and Intangible Heritage Conventions', 6(2) *Heritage & Society* 129-143; Lafrenz Samuels, K., (2016), 'Transnational Turns for Archaeological Heritage: From Conservation to Development, Governments to Governance', 41(3) *Journal of Field Archaeology* 355-367; Cortés-Vázquez, J., Jiménez-Esquinas, G. and Sánchez-Carretero, C., (2017), 'Heritage and Participatory Governance: An Analysis of Political Strategies and Social Fractures in Spain', 33(1) *Anthropology Today* 15-18. Smith, L. and Waterton, E., (2012), *Heritage, Communities and Archaeology*, Bristol Classical Press (London); Göttler, M. and Ripp, M. (Eds.), (2017), *Community Involvement in Heritage Management Guidebook*, Organization of World Heritage Cities (Regensburg); Chirikure, S., Pwiti, G., Damm, C., Folorunso, C.A., Hughes, D.M., Phillips, C., Taruvinga, P., Chirikure, S. and Pwiti, G., (2008), 'Community Involvement in Archaeology and Cultural Heritage Management: An Assessment from Case Studies in Southern Africa and Elsewhere', 49(3) *Current Anthropology* 467-485. Secci and Spanu also note an increasing movement in the same direction with regard to integrating underwater archaeology and community archaeology (Secci, M. and Spanu, P.G., (2015), 'Critique of Practical Archaeology: Underwater Cultural Heritage and Best Practices', 10(1) *Journal of Maritime Archaeology* 29-44, at p. 33).

[44] Gómez-Baggethun, E., Corbera, E. and Reyes-García, V., (2013), 'Traditional Ecological Knowledge and Global Environmental Change: Research Findings and Policy Implications', 18(4) *Ecology and Society* 72; Diver, S., (2016), 'Co-Management as a Catalyst: Pathways to Post-Colonial Forestry in the Klamath Basin, California', 44(5) *Human Ecology* 533-546; Nordic Council of Ministers, (2015), *Local Knowledge and Resource Management: On the Use of Indigenous and Local Knowledge to Document and Manage Natural Resources in the Arctic*, Nordic Council of Ministers (Copenhagen); Supra n. 27, Gillespie, at p. 179; United Nations General Assembly, (2007), UN Declaration on the Rights of Indigenous Peoples, (adopted 2 October 2007), UN Doc. A/RES/61/295.

[45] Wälti, S., (2010), 'Multi-Level Environmental Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 411-422, Edward Elgar (Cheltenham), at p. 413; Calado, H., Bentz, J., Ng, K., Zivian, A., Schaefer, N., Pringle, C., Johnson, D. and Phillips, M., (2012), 'NGO Involvement in Marine Spatial Planning: A Way Forward?', 36(2) *Marine Policy* 382-388, at p. 385; European Commission, (2010), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Maritime Spatial Planning in the EU—Achievements and Future Development*, COM(2010) 771 Final, at p. 5.

adjustment and can make such governance prone to deadlock,[46] stakeholder fatigue,[47] motivational weaknesses,[48] power imbalances,[49] community unpreparedness,[50] harmful path dependency,[51] intra- and inter-community conflict,[52] and the need for a leader or policy 'champion'.[53] It is therefore becoming increasingly suggested that these collective negotiation processes need some form of higher-level coordination, perhaps by trained

[46] Hemmati, M. (Ed.), (2002), *Multi-Stakeholder Processes for Governance and Sustainability: Beyond Deadlock and Conflict*, Routledge (Abingdon); Sørensen, E. and Torfing, J., (2009), 'Making Governance Networks Effective and Democratic through Metagovernance', 87(2) *Public Administration* 234-258.

[47] Reed, M.S., (2008), 'Stakeholder Participation for Environmental Management: A Literature Review', 141(10) *Biological Conservation* 2417-2431, at p. 2420; Leal Filho, W. and Brandli, L., (2016), 'Engaging Stakeholders for Sustainable Development', in *Engaging Stakeholders in Education for Sustainable Development at University Level*, W. Leal Filho and L. Brandli (Eds.), 335-342, Springer (New York), at p. 339.

[48] Ibid, Reed, at p. 2423; Fischer, F., (2012), 'Participatory Governance: From Theory To Practice', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 457-471, Oxford University Press (Oxford), at p. 460; Gustafson, P. and Hertting, N. (2017), 'Understanding Participatory Governance: An Analysis of Participants' Motives for Participation', 47(5) *The American Review of Public Administration* 538-549.

[49] Rosenburg, S.W., (2007), 'Rethinking Democratic Deliberation: The Limits and Potential of Citizen Participation', 39(3) *Polity* 335-360; De Vente, J., Reed, M.S., Stringer, L.C., Valente, S. and Newig, J., (2016), 'How Does the Context and Design of Participatory Decisionmaking Processes Affect their Outcomes? Evidence from Sustainable Land Management in Global Drylands', 21(2) *Ecology and Society* 24; Mielke, J., Vermassen, H., Ellenbeck, S., Milan, B. F. and Jaeger, C., (2016), 'Stakeholder Involvement in Sustainability Science—A Critical View', 17 *Energy Research & Social Science* 71-81; Few, R., Brown, K. and Tompkins, E L., (2007), 'Public Participation and Climate Change Adaptation: Avoiding the Illusion of Inclusion', 7(1) *Climate Policy* 46-59; Brouwer, H., Hiemstra, W., van Vugt, S. and Walters, H., (2013), 'Analysing Stakeholder Power Dynamics in Multi-Stakeholder Processes: Insights of Practice from Africa and Asia', 9(3) *Knowledge Management for Development Journal* 11-31.

[50] Cronkleton, P., Pulhin, J.M. and Saigal, S., (2012), 'Co-Management in Community Forestry: How the Partial Devolution of Management Rights Creates Challenges for Forest Communities', 10(2) *Conservation and Society* 91-102; Sarkki, S., Rantala, L. and Karjalainen, T.P., (2015), 'Fit Between Conservation Instruments and Local Social Systems: Cases of Co-Management and Payments for Ecosystem Services', 2(1) *Change and Adaptation in Socio-Ecological Systems* 59-78; Baynes, J., Herbohn, J., Smith, C., Fisher, R. and Bray, D., (2015), 'Key Factors which Influence the Success of Community Forestry in Developing Countries', 35 *Global Environmental Change* 226-238.

[51] Heinmiller, T., (2009), 'Path Dependency and Collective Action in Common Pool Governance', 3(1) *International Journal of the Commons* 131-147; Van Assche, K., Beunen, R., Jacobs, J. and Teampau, P., (2011), 'Crossing Trails in the Marshes: Rigidity and Flexibility in the Governance of the Danube Delta', 54(8) *Journal of Environmental Planning and Management* 997-1018; Wilson, G.A., (2014), 'Community Resilience: Path Dependency, Lock-In Effects and Transitional Ruptures', 57(1) *Journal of Environmental Planning and Management* 1-26. See also Kirk, E.A., Reeves, A.D. and Blackstock, K.L., (2007), 'Path Dependency and the Implementation of Environmental Regulation', 25(2) *Environment and Planning C: Government and Policy* 250-268.

[52] Castro, A.P. and Nielsen, E., (2001), 'Indigenous People and Co-Management: Implications for Conflict Management', 4(4-5) *Environmental Science & Policy* 229-239; Castro, A.P. and Nielsen, E. (Eds.), (2003), *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, Food and Agriculture Organization of the United Nations (Rome); Yasmi, Y., Schanz, H. and Salim, A., (2006), Manifestation of Conflict Escalation in Natural Resource Management', 9(6) *Environmental Science & Policy* 538-546; De Pourcq, K., Thomas, E., Arts, B., Vranckx, A., Léon-Sicard, T. and Van Damme, P., (2015), 'Conflict in Protected Areas: Who Says Co-Management Does Not Work?', 10(12) *PloS one* e0144943; Daniels S.E. and Walker, G.B., (2001), Working Through Environmental Conflict: The Collaborative Learning Approach, Praeger (Santa Barbara); Patel, T., Dhiaulhaq, A., Gritten, D., Yasmi, Y., De Bruyn, T., Sharma Paudel, N., Luintel, H., Khatri, D.B., Silori, C. and Suzuki, R., (2013), 'Predicting Future Conflict Under REDD+ Implementation', 4(2) *Forests* 343-363.

[53] Huxham, C. and Vangen, S., (2000), 'Leadership in the Shaping and Implementation of Collaboration Agendas: How Things Happen in a (Not Quite) Joined-Up World', 43(6) *Academy of Management Journal* 1159-1175; Mayer, M. and Kenter, R., (2017), 'The Prevailing Elements of Public Sector Collaboration', in *Advancing Collaboration Theory: Models, Typologies, and Evidence*, J.C. Morris and K. Miller-Stevens (Eds.), 43-64, Routledge (Abingdon), at pp. 52-54; Supra n. 22, Bryson, Crosby and Stone.

collaborative facilitators and mediators.[54] Furthermore, there is a growing volume of research dedicated to resolving these necessary governance challenges, with subjects ranging from collaborative governance,[55] new governance,[56] smart regulation,[57] network governance,[58] co-management,[59] co-regulation,[60] polycentric governance,[61] public-private partnerships,[62] participatory governance,[63] to reflexive governance.[64] All of these fields see the development of more effective governance as a matter of necessity given the larger gains available than through traditional law. Yet, such community governance

[54] Celtic Seas Partnership, 'Fisheries Mediation', (at: http://www.celticseaspartnership.eu/celtic-seas-partnership/fisheries-mediation; accessed 1 May 2019); Dreyer, M. and Sellke, P., (2015), 'The Regional Advisory Councils in European Fisheries: An Appropriate Approach to Stakeholder Involvement in an EU Integrated Marine Governance?', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 121-140, Routledge (Abingdon), at p. 136; Engel, A. and Korf, B., (2005), *Negotiation and Mediation Techniques for Natural Resource Management (Vol. 3)*, Food and Agriculture Organization of the United Nations (Rome); Muigua, K., (2016), 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation', 4(2) *Alternative Dispute Resolution* 1-63, CIArb Kenya (Nairobi); Supra n. 22, Bryson, Crosby and Stone.

[55] Supra n. 5; Morris, J.C. and Miller-Stevens, K. (Eds.), (2017), *Advancing Collaboration Theory: Models, Typologies, and Evidence*, Routledge (Abingdon).

[56] Supra n. 6.

[57] Gunningham, N. and Grabosky, P., (1998), *Smart Regulation: Designing Environmental Policy*, Oxford University Press (Oxford); Bloor, M., Datta, R., Gilinskiy, Y. and Horlick-Jones, T., (2006), 'Unicorn Among the Cedars: On the Possibility of Effective 'Smart Regulation' of the Globalized Shipping Industry', 15(4) *Social & Legal Studies* 534-551.

[58] Supra nn. 24 and 29.

[59] Supra n. 26; Linke, S. and Bruckmeier, K., (2015), 'Co-Management in Fisheries – Experiences and Changing Approaches in Europe', 104 *Ocean and Coastal Management* 170-181.

[60] Marsden, C.T., (2011), *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, Cambridge University Press (Cambridge); Martinez, M.G., Fearne, A., Caswell, J.A. and Henson, S., (2007), 'Co-Regulation as a Possible Model for Food Safety Governance: Opportunities for Public-Private Partnerships', 2007 *Food Policy* 35.

[61] Supra n. 25, Ostrom; McGinnis, M.D. (Ed.), (1999), *Polycentric Governance and Development: Readings from the Workshop in Political Theory and Policy Analysis*, University of Michigan Press (Michigan); Roe, M., (2009), 'Multi-Level and Polycentric Governance: Effective Policymaking for Shipping', 36(1) *Maritime Policy & Management* 39-56; Neef, A., (2009), 'Transforming Rural Water Governance: Towards Deliberative and Polycentric Models?', 2(1) *Water Alternatives* 53-60; Newig, J. and Fritsch, O., (2009), 'Environmental Governance: Participatory, Multi-Level – and Effective?', 19(3) *Environmental Policy and Governance* 197-214.

[62] Osborne, S.P. (Ed.), (2007), *Public-Private Partnerships: Theory and Practice in International Perspective*, Routledge (Abingdon); Morley, M., (2015), *The Public-Private Partnership Handbook: How to Maximize Value from Joint Working*, Kogan Page (London); Newman, J., (2017), *Governing Public-Private Partnerships*, McGill-Queen's University Press (Kingston, Ontario); Beisheim, M., Campe, S. and Schäferhoff, M., (2010), 'Global Governance through Public-Private Partnerships', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 370-382, Edward Elgar (Cheltenham); Bovis, C., (2018), *Public-Private Partnerships in the European Union*, Routledge (Abingdon).

[63] Lovan, W.R., Murray, M. and Shaffer, R. (Eds.), (2003), *Participatory Governance: Planning, Conflict Mediation and Public Decision-Making in Civil Society*, Routledge (Abingdon); Hertting, N. and Kugelberg, C., (Eds.), (2017), *Local Participatory Governance and Representative Democracy: Institutional Dilemmas in European Cities*, Routledge (Abingdon); Heinelt, H., (2002), *Participatory Governance in Multi-Level Context: Concepts and Experience*, Springer VS (Wiesbaden); Supra n. 48, Fischer.

[64] Voß, J., Bauknecht, D. and Kemp, R. (Eds.), (2006), *Reflexive Governance for Sustainable Development*, Edward Elgar (Cheltenham); Brousseau, E., Dedeurwaerdere, T. and Siebenhüner, B. (Eds.), (2012), *Reflexive Governance for Global Public Goods*, MIT Press (Cambridge, MA); De Schutter O. and Lenoble, J. (Eds.), (2010), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, Hart (Oxford).

is needed only to bolster the specific areas where there are externalities or weaknesses present in the first two traditional forms of regulation – i.e., command-and-control and market-based regulation – causing them to require additional community input, innovation, leadership and buy-in.

Environmental governance under such a community-level approach would thus support the principle of *subsidiarity* being applied to its furthest extent, in that the "lower" levels of governance – stakeholders and communities themselves, whether represented as towns, villages, councils, groups, associations, companies, or even economic and social sectors – should be viewed as the first choice as governors, except in those areas where public authorities are required to produce higher level regulation to steer local, national or regional decision-making, or to develop meta-regulation to facilitate such collaborative processes and to achieve effective public-private partnering.[65] This also justifies the increasing importance attached to transparency and participatory rights in environmental planning and decision-making.[66] Such transparency may relate to the regulatory processes, thereby making them more participative and legitimate. It also provides stakeholders with ammunition to enforce their environmental interests in multi-level public or private regulatory regimes, as well as engage with and drive forward reviews of state compliance.[67] What is more, it improves the collective knowledge (and thus accurate preference-setting) of negotiating stakeholders, thus improving coordination of skills, innovation, effort and resources.[68] Such participatory rules in international environmental law also provide consumers, voters or stakeholders with more accurate information on the social and environmental responsibility of organisations, nations and other stakeholders.

[65] Brousseau, E., Dedeurwaerdere T. and Siebenhüner, B., (2012), 'Introduction', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 1-18, MIT Press (Cambridge, MA) at p. 7.
[66] Brunnée, J. and Hey, E., (2013), 'Transparency and International Environmental Institutions', in *Transparency in International Law*, A. Bianchi and A. Peters (Eds.), 23-48, Cambridge University Press (Cambridge); Gillespie, A., (2001), 'Transparency in International Environmental Law: A Case Study of the International Whaling Commission', 14(2) *Georgetown International Environmental Law Review* 333-348; Raustiala, K., (1997), 'The Participatory Revolution in International Environmental Law', 21(2) *Harvard Environmental Law Review* 537-586.
[67] Marauhn, T., (1996), 'Towards a Procedural Law of Compliance Control in International Environmental Relations', 56(3-4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 696-731; van Asselt, H., (2016), 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance Under the Paris Agreement', 6(1-2) *Climate Law* 91-108; van Asselt, H., (2016), *Policy Brief: How Non-State Actors Can Contribute to More Effective Review Processes under the Paris Agreement*, Stockholm Environment Institute (Stockholm).
[68] Supra n. 33, Englender et al, at p. 187.

As Altvater discussed in interview, the EU and national governments have arguably been too 'arrogant' in the past and have failed to really listen to the concerns and interests of local and regional communities.[69] However, she points out, they are becoming much more cautious now, particularly in the light of political developments across Europe, where 'there is a great move now' towards decentralisation and community empowerment in addressing wider challenges.[70] Pertinently, she adds:

> '[Y]ou really need to include communities and, in my training with coastal communities, I see of course that they feel lost and forgotten, and if you show them ways and work with them, you see how much energy they have. If they see someone is really interested in them, then they get more power and strength and more self-confidence and say what they want. They have a louder voice, which is very relevant for them.'[71]

3. Community Governance and Meta-Regulation

At the heart of the social inclusivity requirement is the foremost realisation that public actors alone are not capable of producing all global public goods themselves. The forces of externalisation, privatisation, and innovation are pathways by which private actors are increasingly propelled into the role of providing global public goods, particularly in the transboundary environment.[72] Indeed, a familiar challenge in the achievement of global public good output is the gradual shrinking in available government budgets around the world. As Firth said, regarding a new European framework for UCH protection, one of the issues would be the 'austerity pressure for the last decade now, meaning that . . . you would be looking to public authorities who generally have got no resources and are definitely not looking to extend their remit. I think that's a major problem.'[73] Similarly, as Historic England say of protected wrecks in the United Kingdom:

> '[O]ur financial resources can only solve a small fraction of the problems. Other partners also play a vital role in stabilising these important sites.

[69] Altvater, S., (2018), Interview with Susanne Altvater, 17 May 2018, Transcript on File.
[70] Ibid.
[71] Ibid.
[72] Mol, A.P., (2016), 'The Environmental Nation State in Decline', 25(1) *Environmental Politics* 48-68; Heal, G.M., (1999), 'New Strategies for the Provision of Global Public Goods: Learning from International Environmental Challenges', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 220-239, Oxford University Press (Oxford), at pp. 221-222.
[73] Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File.

> Concerted efforts by owners, local government, national government departments and agencies and the organisations that make decisions about our environment can all help to make a real difference.'[74]

The result is that, across the world, we increasingly see private actors filling this void in order to deliver public good provision where governments are no longer able to justify the allocation of tax revenue from present-day national citizens.[75] From here, top-down regulation can therefore be utilised to varying degrees in order to provide the 'rules' for community cooperation, facilitate stakeholder negotiations, allocate suitable resources, resolve intractable disputes, prevent externalisation of harms by communities, and to keep communities on track towards the production of public goods.[76] In so many words, public authorities appear increasingly as facilitators or coordinators of public-private effort, trying as far as possible – depending on the reliability and level of trust and goodwill among community members – to enable communities to self-govern in the achievement of wider social and public objectives. Such co-managed communities can be found globally, such as the co-regulation of internet intermediaries in cyberspace,[77] or the fall-back public oversight of international commercial arbitration under the United Nations 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards;[78] just as they can be found in local contexts, such as the adaptive co-management of

[74] Historic England, 'Protected Wreck Sites at Risk', (at: https://historicengland.org.uk/advice/heritage-at-risk/archaeology/protected-wreck-sites-at-risk; accessed 1 May 2019).

[75] Knill, C. and Lehmkuhl, D., (2002), 'Private Actors and the State: Internationalization and Changing Patterns of Governance', 15(1) *Governance* 41-63; Börzel, T.A. and Risse, T., (2005), 'Public-Private Partnerships: Effective and Legitimate Tools of International Governance', in *Complex Sovereignty: Reconstructing Political Authority in the Twenty-First Century*, E.Grande and LW. Pauly (Eds.), 195-216, University of Toronto Press (Toronto); Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford), at pp. 61-62; Green, J.F., (2013), *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance*, Princeton University Press (Princeton); Brinkerhoff, D.W. and Brinkerhoff, J.M., (2011), 'Public-Private Partnerships: Perspectives on Purposes, Publicness, and Good Governance', 31(1) *Public Administration and Development* 2-14.

[76] Supra n. 28; Viet Thang, H., (2018), *Rethinking Fisheries Governance: The Role of States and Meta-Governance*, Palgrave Macmillian (London); Edwards, M. and Zadek, S., (2003), 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors', in *Providing Global Public Goods: Managing Globalization*, I. Kaul, P. Conceição, K. Le Goulven and R.U. Mendoza (Eds.), 200-224, Oxford University Press (Oxford), at p. 200.

[77] Supra n. 60, Marsden.

[78] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (adopted 10 June 1958 (New York), in force 7 June 1959), 330 UNTS 38, at Art. V2(b); Buchanan, M.A. (1988), 'Public Policy and International Commercial Arbitration', 26(3) *American Business Law Journal* 511-553; Martin, J.B., (2016), 'Jurisdictionalists v. Contractualists: Who is Winning the Mandatory Law Debate in International Commercial Arbitration?', 27(4) *American Review of International Arbitration* 475-494.

ecologically-variable marine protected areas or fishing zones,[79] or the co-governed community management of common spaces or resources.[80]

As Kaul has put it, '[i]n some instances, governments still play a critical role, helping non-state actors to overcome collective-action problems. But they rarely deliver public goods in their entirety.'[81] We therefore increasingly find efficient co-management arrangements between states and private actors in what have become known as public-private partnerships,[82] where such partnerships might involve the consultation, enforcement or regulatory input by private standards bodies, right up to full-scale multi-actor regimes, incorporating objectives and rules which have been defined by a combination of public and private actors.[83] The global public good of ocean security, for example, is increasingly the result of efficient coordination of resources between public and private actors; ranging from relatively simple data sharing between public regulators and private corporations; to self-regulation and corporate social responsibility among maritime sectors; to self-funded NGOs and epistemic actors; right up to full-scale mercenary enforcement of ocean security by firms hiring private armies.[84]

The purpose of meta-regulation by public authorities is thus to create an environment where stakeholders can independently determine those areas where further intra- or inter-community cooperation, coordination, and collaboration – what Brown and Keast have referred to as the '3Cs' – could achieve more effective and sustainable results than traditional command-and-control regulation.[85] Such co-managed communities can be

[79] Supra nn. 26 and 59; Pomeroy, R.S. and Berkes, F., (1997), 'Two to Tango: The Role of Government in Fisheries Co-Management', 21(5) *Marine Policy* 465-480.
[80] Supra nn. 3-5; Supra n. 26, Singleton; Supra n. 26, Koontz et al.; Supra n. 26, Goss; Supra n. 26, Weber.
[81] Kaul, I., (2012), 'Rethinking Public Goods and Global Public Goods', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 37-54, MIT Press (Cambridge, MA), at p. 41; Supra n. 14, Bodansky, at p. 653.
[82] Supra n. 62; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford), at p. 489; Supra n. 29, Bederman, at p. 151.
[83] Ibid; Supra n. 81, Kaul, at p. 41.
[84] Liss, C. and Sharman, J.C., (2015), 'Global Corporate Crime-Fighters: Private Transnational Responses to Piracy and Money Laundering', 22(4) *Review of International Political Economy* 693-718; Seyle, C. and Madsen, J.V., (2015), 'Non-State Actors in Maritime Security', in *Strengthening Maritime Security Through Cooperation*, I. Chapsos and C. Kitchen (Eds.), 23-36, IOS Press (Amsterdam); Petrig, A., (2013), 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates', 62(3) *International & Comparative Law Quarterly* 667-701; Supra n. 29, Bederman, at p. 83.
[85] Brown, K. and Keast, R., (2003), 'Citizen-Government Engagement: Community Connection Through Networked Arrangements', 25(1) *Asian Journal of Public Administration* 107-131, at pp. 115-119; Keast, R., Brown, K. and Mandell, M., (2007), 'Getting the Right Mix: Unpacking Integration Meanings and Strategies', 10(1) *International Public Management Journal* 9-33; Mandell, M. and Keast, R., (2007),

found on a scale between those that are almost entirely autonomous and free to self-regulate, to those communities which are still primarily steered by detailed public regulation.[86] It is even feasible that communities can be largely entrusted to design their own regulatory systems from the bottom-up, effectively utilising public regulatory tools and market-based models in the process. In many senses, therefore, this emphasises that exclusive focus on education and capacity building will not be sufficient if the surrounding legal framework fails to create an effective environment of engagement and enforcement. However, mapping out the design and implementation of such co-directional social-ecological systems in the context of UCH protection, making use of public resources and facilitative leadership, is beyond the present remit which is only intended to introduce the concept of community-level regulation and its future potential.

In order to effectively stimulate communities into engaging with and providing public goods for the international community, it is hence important for meta-regulators to think about community incentivisation, motivation or compensation. Indeed, if the benefits for protecting a resource will spillover to the wider international community or to future generations, then the community will likely need *additional* incentive to address the shortfall in cost-benefit distribution.[87] The recent announcement that several wealthy debtor nations to the Seychelles have agreed to deduct billions of dollars from their national debt, in exchange for the implementation of a vast marine protected area across the Seychelles, is a good illustration of this beneficial trade-off in the inter-national context.[88] Another market-based strategy which enables communities to more effectively propertise a local resource, for example, is the motivation to secure and maintain World Heritage status so as to attract global tourism, which in turn provides a strong financial incentive for communities to protect and preserve their local heritage. Similarly, Bederman provides an illustrative example in the differing approaches to protecting wild

'Evaluating Network Arrangements: Toward Revised Performance Measures', 30(4) *Public Performance & Management Review* 574-597. See generally supra n. 55, Morris and Miller-Stevens.

[86] For example, Marsden illustrates this scale in the context of cyberspace (Supra n. 60, Marsden).

[87] Engel, S., Pagiola, S. and Wunder, S., (2008), 'Designing Payments for Environmental Services in Theory and Practice: An Overview of the Issues', 65(4) *Ecological Economics* 663-674; Redford, K.H. and Adams, W.M., (2009), 'Payment for Ecosystem Services and the Challenge of Saving Nature', 23(4) *Conservation Biology* 785-787; Farley, J. and Costanza, R., (2010), 'Payments for Ecosystem Services: From Local to Global', 69(11) *Ecological Economics* 2060-2068; Tacconi, L., Mahanty, S. and Suich, H., (2010), 'Forests, Payment for Environmental Services and Livelihoods', in *Payments for Environmental Services, Forest Conservation and Climate Change: Livelihoods in the Redd?*, L. Tacconi, S. Mahanty and H. Suich (Eds.), 1-25, Edward Elgar (Cheltenham); Supra n. 22, Perrings and Gadgil, at p. 542.

[88] Carrington, D., (2018), 'Debt for Dolphins: Seychelles Creates Huge Marine Parks in World-First Finance Scheme', 22 February 2018, *The Guardian*, (at: https://www.theguardian.com/environment/2018/feb/22/debt-for-dolphins-seychelles-create-huge-new-marine-parks-in-world-first-finance-scheme, accessed: 1 May 2019).

African elephants from poaching in Kenya and Zimbabwe.[89] In this study, although Kenya increased the number of game wardens and their powers of enforcement, they still suffered a considerable loss of elephant population, particularly through the bribery of wardens. By contrast, Zimbabwe introduced a more bottom-up system of community ownership of the elephant herds, enabling local communities to share in the income produced by tourism and providing them with the tools to deter or report poaching, leading to a considerably improved long-term protection for the local population.[90]

Nevertheless, as Zulu once said in the context of forest co-management in Malawi, thinking of incentives must go beyond thinking merely of financial payoff, but should also consider other psychological and sociocultural motivations.[91] Thus, more creative examples of payments for such 'environmental services' are increasingly found in a number of contexts.[92] In some cases, it is possible that merely general awareness-raising and education about the external "value" of local resources might improve a sense of community guardianship, although a moral sense of value is unlikely to be sufficient motivation alone and, as Lipe points out, it can even increase the risk of looting and free riding by the community.[93] A good example of this in the UCH context has been illustrated by Harvey and Shefi regarding the *Clarence* wreck in Australia. Here, a protected zone was created around the wreck and widely publicised, including placing markers and signage at the site. However, this 'drew the attention of the public to the shipwreck' and, in fact, the markers became a useful reference point for anchoring before diving and recreational fishing, harming the wreck further.[94]

[89] Supra n. 29, Bederman, at pp. 75-78.
[90] Ibid.
[91] Zulu, L., (2013), 'Bringing People Back into Protected Forests in Developing Countries: Insights from Co-Management in Malawi', 5(5) *Sustainability* 1917-1943; c.f., Fisher, J., (2012), 'No Pay, No Care? A Case Study Exploring Motivations for Participation in Payments for Ecosystem Services in Uganda', 46(1) *Oryx* 45-54.
[92] E.g Thomas, D. (Ed.), (2006), *Livelihoods and the Environment at Important Bird Areas: Listening to Local Voices*, BirdLife International (Cambridge), (at: http://www.birdlife.org/sites/default/files/attachments/listening-to-local-voices-IBAs.pdf; accessed 1 May 2019); Dinerstein, E., Rijal, A., Bookbinder, M., Kattell, B. and Rajuria, A., (1999), 'Tigers as Neighbours: Efforts to Promote Local Guardianship of Endangered Species in Lowland Nepal', in *Riding the Tiger: Tiger Conservation in Human-Dominated Landscapes*, J. Seidensticker, S. Christie and P. Jackson (Eds.), 316-333, Cambridge University Press (Cambridge); Mayrand K. and Paquin, M., (2004), *Payments for Environmental Services: A Survey and Assessment of Current Schemes*, Unisféra International Centre (Montreal).
[93] Lipe, W.D., (2009), 'Archaeological Values and Resource Management, in *Archaeology and Cultural Resource Management: Visions for the Future*, L. Sebastian and W.D. Lipe (Eds.), 41-64, School for Advanced Research (Santa Fe), at p. 60.
[94] Harvey, P. and Shefi, D., (2014), 'Thirty Years of Managing the Wreck of the Historic Australian Colonial-Built Schooner Clarence (1841–1850): From Ineffective to Pro-Active Management', 9(2) *Journal of Maritime Archaeology* 191-203, at pp. 193-194.

In other cases, the incentive for communities to engage with public objectives may be more obvious. For example, a fishing community will understand that without cooperation and a community ethic, a tragedy of the commons might produce a lose-lose situation for all users of the shared ecosystem. Other motivators, outside of tourism or fiscal incentives, could also include the provision of resources and opportunities for development, such as capacity building, exchange programmes, or research twinning – all of which are visible elements in the UNESCO Convention. In other words, communities can be immensely effective regulatory tools, provided they are suitably supported, motivated, and empowered.

4. Community Governance and Underwater Cultural Heritage

(a) Community Buy-In

The most dominant means of achieving effective community governance in the protection of UCH – outside of the governance by national communities – has been by enhancing the level of community 'buy-in' with the values and benefits of protection. It was argued throughout Chapters 3 to 5 that a critical issue with the multiple-value nature of heritage is that much of this value is lost as an externality to *others*, outside of the communities or national governments implicated with its protection and preservation. The concept of community buy-in therefore focuses on educating the community and building a sense of pride or ownership in heritage over which they have stewardship. This increases the overall share that the community receives of the abstract values of the heritage, such as archaeological, educational, historical, social, empathy, and cultural value, and impacts their motivation and incentive to ensure its protection. As De La Torre and Mason have said, it 'is self-evident that no society makes an effort to conserve what it does not value'.[95] Similarly, as Guérin responded in interview, 'if you ask for something then you have to say why.'[96] Moreover, as Aznar responds, '[t]he best rules, the sexiest institutions are useless if citizens are not concerned about' the protection of UCH and the time capsules that they represent.[97] Williams also noted how he had come to appreciate that 'the biggest factor of all', in terms of compliance, 'is the human mindset and institutional memory.'[98]

[95] de la Torre, M. and Mason, R., (2002), 'Introduction', in *Assessing the Values of Cultural Heritage – Research Report*, M. de la Torre (Ed.), 3-4, The Getty Conservation Institute (Los Angeles), at p. 3.
[96] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File.
[97] Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File.
[98] Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File.

Examples abound from where such community buy-in has been effective in protecting UCH. Indeed, much effort has been focused on providing communities with a better understanding of UCH's archaeological, historical and educational value. For UNESCO and other international initiatives, education of communities has been seen as an affordable, politically sensitive and long-term solution to community empowerment and resilience, eventually leading to effective self-governance in the protection of UCH.[99] It has also been a key means of compensation for former flag states to incentivise coastal states to cooperate bilaterally, usually through MOUs, with regard to specific wrecks.[100] A good example of this community engagement of UCH value is that provided by Erreguerena in relation to the Sound of Campeche in Mexico, who suggests that top-down regulation has been ineffective in protecting the UCH contained in the Sound of Campeche; but it is only by intensive efforts at community engagement, education and collaboration, including with local divers, fisheries, maritime sectors, coastal communities, academic institutions, and international organisations and NGOs, that more effective protection has been achieved.[101]

The impact of local 'valuation' of heritage has also been aptly demonstrated in 2017 by Jeffery and Palmer, who note the difference in protection of nearby UCH across different Pacific Islands which varies 'for a number of socio-historical-political reasons.'[102] Tellingly, they note that the Republic of Palau 'places significant value on the many Japanese World War II sites in its waters' which has led to firm reprimands for looters and free riders. By contrast, the State of Chuuk in the Federated States of Micronesia, 'appears to place little historical value on their Chuuk Lagoon World War II shipwrecks', which has resulted in poor protection and looting.[103] The *Clarence* schooner in Australia, referred to earlier, provides another illustrative example which is similar, in many senses, to Bederman's Zimbabwean elephants example. In particular, Harvey and Shefi have relayed how despite providing enforcement officers with the capacity to enforce on-the-spot fines and ramping up the value of the fines, 'the threat to *Clarence* was not significantly reduced.'[104] Instead, far more effective protection was finally achieved once

[99] Supra n. 96, Guérin.
[100] Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File.
[101] Erreguerena, L.P., (2006), 'The Sound of Campeche: A Place Full of History', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 17-19, ICOMOS (Paris).
[102] Jeffery, B. and Palmer, K.A., (2017), 'The Need for a Multivocal Approach to Researching and Managing Guam's World War II Underwater Cultural Heritage', 46(1) *International Journal of Nautical Archaeology* 164-178, at p. 175.
[103] Ibid.
[104] Supra n. 94, Harvey and Shefi, at p. 197.

the local community was brought in and more effectively educated about the wreck's importance and, from there, utilised in its long-term stewardship.[105]

Another common means of effectively achieving such community buy-in has been the conversion of marine and coastal communities into amateur archaeologists. By utilising archaeological approaches and methods of thinking, communities are therefore not only capable of unlocking many of UCH's dormant recreational, social, historical, educational, excitement, and empathy values, but they are also more likely to prefer to protect and preserve it as an archaeological resource, rather than merely an economic or aesthetic resource. As Manders said in interview, you should offer a chance to 'stakeholders to become part of it, because then you will know for sure that you won't do an excavation on that site, so let the amateur archaeologists do some stuff there. So, opening up for others – participation – that should be a big important part of it.'[106] Examples of such approaches being used effectively can be found, including successes of the South Carolina Sport Diver Archaeology Management Program,[107] the Submerged Sites Education and Archaeological Stewardship program in Florida,[108] and the strategy by Historic England to encourage archaeological training of divers through the Nautical Archaeology Society (NAS).[109]

Bernier also provides an illustrative example with the case of the *Elizabeth and Mary* wreck in Baie-Trinité, Canada, where local sports divers who regularly visited the threatened site were given archaeological training through the NAS. As a result, the divers, 'whose activities have in the past occasionally had a negative impact on shipwrecks due to a lack of awareness of the importance of protecting shipwrecks, have now become major players and advocates in the quest to protect underwater heritage.'[110] Bernier adds, '[h]aving a group of trained local divers paid off in a number of ways.

[105] Ibid, at pp. 198-201.
[106] Supra n. 100, Manders.
[107] Deming, A.M., (2014), 'The Success of the South Carolina Sport Diver Archaeology Management Program', in *Between the Devil and the Deep: When the Land Meets the Sea*, D.A. Scott-Ireton (Ed.), 85-95, Springer (New York).
[108] Jameson Jr, J.H., (2014), 'Toward Multivocality in Public Archaeology: Public Empowerment Through Collaboration', in *Between the Devil and the Deep: When the Land Meets the Sea*, D.A. Scott-Ireton (Ed.), 3-10, Springer (New York).
[109] Dromgoole, S., (2006), 'United Kingdom', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 325.
[110] Bernier, M-A., (2006), 'To Dig or not to Dig? The Example of the Shipwreck of the Elizabeth and Mary', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 64-66, ICOMOS (Paris), at p. 66.

Without these divers, visits to the site would have been much fewer and farther between.'[111] The core benefit of all such archaeological training programmes, as Scott-Ireton puts it, is that they enable 'divers to produce information, rather than just consume information'.[112] Finally, it is also worth acknowledging that other coastal and marine communities, outside of the diving community, can be equally converted and utilised. For example, in England, the CITiZAN programme provides tools, resources and educational programmes to encourage coastal communities to take an interest in archaeological heritage found at low-tide.[113] Similarly, the SCAPE programme in Scotland has utilised partnerships between communities and archaeologists, in order to improve the surveys of coastal heritage.[114]

In addition to community education about UCH value and the provision of archaeological cooperation and training, one of the key pathways to achieving effective community buy-in has been by rousing or leveraging a stronger *sense of ownership* over UCH which falls under the community's protection or stewardship. For example, Gribble writes how improvement in the protection of precolonial fish traps on the South Western Cape Coast of Africa is likely to be achieved 'by increasing public awareness of the traps, and by encouraging local coastal communities to understand their significance and importance and to take ownership of "their" traps.'[115] Similarly, a few years later, Gribble writes that giving communities 'a stake in the sites, can ensure their long-term preservation, investigation, and understanding'.[116] Interestingly, Burgin goes one further and says that many efforts to protect UCH in the Thunder Bay National Marine Sanctuary have attempted to reach out to the 100,000 certified divers in the Great Lakes region 'and turn them from stakeholders to shareholders.'[117] Scott-Ireton also describes how the attitude of the nearby coastal and marine communities towards the *Urca de Lima* wreck changed once the site was formally designated as a preserve and was placed 'in the public's

[111] Ibid.
[112] Scott-Ireton, D.A., (2014), 'Sailing the SSEAS: A New Program for Public Engagement in Underwater Archaeology', in *Between the Devil and the Deep: When the Land Meets the Sea*, D.A. Scott-Ireton (Ed.), 119-128, Springer (New York), at p. 126.
[113] See 'CITiZAN', (at: https://www.citizan.org.uk/; accessed 1 May 2019).
[114] See 'SCAPE', (at: http://www.scapetrust.org/; accessed 1 May 2019).
[115] Gribble, J., (2006), 'Pre-Colonial Fish Traps On the South Western Cape Coast, South Africa', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 29-31, ICOMOS (Paris), at p. 31.
[116] Gribble, J., Parham, D. and Scott-Ireton, D.A., (2009), 'Historic Wrecks: Risks or Resources?', 11(1) *Conservation and Management of Archaeological Sites* 16-28, at p. 27 (per Gribble).
[117] Burgin, L.R., (2015), 'Managing Michigan's Underwater Heritage: The Past, Present, and Future of Thunder Bay National Marine Sanctuary', *University of Michigan Working Papers in Museum Studies: Future Leaders*, Number 1 (2015) (at: http://ummsp.rackham.umich.edu/wp-content/uploads/2015/09/burgin-working-paper-fl-series-aug-7.pdf; accessed: 1 May 2019), at p. 7.

trust'.[118] She adds that, 'Shipwreck Preserves throughout Florida have enabled local communities to develop a sense of stewardship and pride in their submerged historic sites as pieces of their own history and heritage. By establishing a Preserve, residents and visitors have the opportunity to become better informed about their past and to become more aware of the long-term value of preserving a historic shipwreck in its natural setting.'[119] Similarly, Drew points out that because local World War II shipwrecks are regarded as 'national treasures' in the Solomon Islands, it means that local residents provide the protection 'as de facto custodians of the wreck sites', even without a formal shipwreck management programme.[120]

Indeed, many national communities utilise this same sense of national community ownership over UCH within coastal waters, such as France, Italy and Greece. Furthermore, considerable effort to include local community buy-in through building a sense of ownership has also been taken and further vindicated across Europe. For example, following on from the early efforts of the NAS's 'Adopt-a-Wreck' scheme, there have been recent efforts through the Maritime Archaeology Trust, working with Historic England, to develop a new scheme for 'Heritage Partnership Agreements' between local communities and heritage agencies working in collaboration to protect specific sites.[121] As their Final Report states, 'it appears fundamental to the success of any HPA programme that people want to conduct work on the sites concerned because they have a personal, shared or community interest in them. This to an extent revolves around the creation of a sense of ownership of such heritage assets'.[122] Yet further, and clearly taking into account its increasingly limited budget, Historic England have also recently begun collaborating more closely with the National Coastwatch Institution and Project Kraken, to improve a sense of stewardship over UCH and thus drive up monitoring by coastal and maritime communities.[123] For many, therefore, community buy-in and engagement with the values to be obtained by UCH and its protection is a vital

[118] Scott-Ireton, D.A., (2006), 'Florida's Underwater Archaeological Preserves: Preservation through Education', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 5-7, ICOMOS (Paris), at p. 7.
[119] Ibid.
[120] Drew, T., (2010), 'Solomon Islands', in *Underwater Cultural Heritage in Oceania*, Guérin, U, Egger B. and Penalva, V. (Eds.), 87-90, UNESCO (Paris), at p. 90.
[121] Maritime Archaeology Trust, (2015), *Heritage Partnership Agreements for Undesignated (Marine) Sites: A Pilot Study Final Project Report*, English Heritage Project 6414, Maritime Archaeology Trust (Southampton); Supra n. 109, Dromgoole, at p. 337.
[122] Ibid, Maritime Archaeology Trust, at p. 19.
[123] Dunkley, M., 'Protecting the Marine Historic Environment: Detecting, Investigating and Reducing Heritage Crime at Sea', *Historic England*, (at: https://historicengland.org.uk/whats-new/debate/protecting-historic-environment-at-sea/; accessed 1 May 2019).

pathway to addressing many of the inadequacies of using top-down regulation and the difficulties of relying exclusively on poorly-resourced public agencies to produce public goods. It also resolves fragmentation and enforcement weaknesses at the heart of the international system, as identified in Chapters 3 to 5, by ensuring that the stakeholder level represents strong compliance and integration with the public objects of the wider system.

As Leshikar-Denton said when discussing UCH protection in the Cayman Islands, 'knowledge inspires appreciation among the public for cultural heritage sites, and results in enlistment of allies in the guardianship of these irreplaceable resources.'[124] Similarly, Breen and O'Sullivan once discussed the expansion of policing and heritage enforcement agencies protecting UCH across Ireland, but conceded that, however, 'it is only through local community education and vigilance that coastal policing can be effective.'[125] Even more appositely, Gribble discusses the unfortunate case of SS *Maori*, which was subject to considerable looting and souvenir hunting, saying:

> 'But legislation cannot stand alone. Of equal importance to the protection of underwater cultural heritage is an understanding by those using the resource and the wider South African public of what underwater cultural heritage is, and why it is worth preserving. Without winning over hearts and minds, legislation can never truly succeed.'[126]

However, it should be obvious that community buy-in, while necessary and perhaps the most effective example of achieving global protection by community-level governance, is not on its own a panacea. The first great challenge is that, realistically speaking, not all in the community will share the same passion for the archaeological, educational, historical, social, excitement and empathy values produced by their local UCH. Some members of the community – no matter the amount of education or training they receive – will continue to enjoy UCH for its economic value and, worse, may receive greater

[124] Leshikar-Denton, M.E., (2006), 'Foundations in Management of Maritime Cultural Heritage in the Cayman Islands', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 23-25, ICOMOS (Paris), at p. 24.
[125] Breen, C. and O'Sullivan, A., (2002), 'Underwater Archaeology in the Republic of Ireland', in *International Handbook of Underwater Archaeology*, C. Ruppe and J. Barstad (Eds.), 401-418, Springer (New York), at p. 415.
[126] Gribble, J., (2006), 'The Sad Case of the SS *Maori*', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 41-43, ICOMOS (Paris), at p. 42.

excitement or economic value from its illicit recovery. In other words, individuals cannot escape the same combined rationalist and constructivist decision-making motives explored in the context of nation states in Chapter 3. In combination with this, therefore, as was with the example of the *Clarence* schooner above,[127] there is a risk that by increasing a community's engagement by educating them about the value of local heritage may actually increase the risk of looting or free riding. As Maes responded, '[p]ublic disclosure of certain UCH sites may be problematic for attracting looting, as such [it] may be difficult to provide the exact location of certain sites.'[128]

Some might argue that the risk of looting can be addressed by education. For example, Erreguerena writes how 'minor looting' still takes place at the Sound of Campeche, but she believes that this is caused by 'the lack of consciousness of some sport divers and fishermen who are not aware of the importance and cultural value of this legacy.'[129] The reality, however, is probably more that these members of the community do not share the same interest in the intangible qualities of UCH heritage and, perhaps understandably given their socioeconomic situation, are more interested in its more tangible or economic value. Similarly, in contrast to the *Clarence* case, Nutley does provide a persuasive argument that community engagement played a vital role in protecting the *Lady Darling* wreck in New South Wales, despite its value and location becoming widely disseminated.[130] Nevertheless, there are perhaps other distinguishing factors which are likely to have played an important role in the case of *Lady Darling*, beyond the mere 'buy-in' of the community (covered in subsection (b) below).

Relying on an approach which provides the community with a sense of ownership is perhaps also at risk of going too far in that, eventually, communities may ascribe their own values and preferences on the future management of that heritage, disregarding the views of the international or external community. For example, a coastal community may develop a sense of ownership over a vessel in its waters and decide to utilise it as a site for sport diving and tourism; while an external 'origin' state linked to the site may feel a powerful spiritual or historical connection and, especially if it contained human remains,

[127] Supra n. 94, Harvey and Shefi.
[128] Maes, F., (2018), Written Response of Frank Maes, 16 March 2018, Filed with Author.
[129] Supra n. 101, Erreguerena, at p. 19.
[130] 'Most importantly, the system could not work so effectively without local interest in historical values and long-term recreational viability of this site.' (Nutley, D., (2006), 'Protected Zones and Partnerships: Their Application and Importance to the Protection of Underwater Cultural Heritage', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 32-34, ICOMOS (Paris), at p. 34).

may wish to see it respected in a manner which leaves it undisturbed. Contrasting with this, however, is the need for sensitivity around local cultural heritage and to ensure that local values are understood, empowered and included within designation and management processes. For example, Jeffery has pointed out how failures to engage the community in the protection of the Chuuk Lagoon were largely 'attributed to the use of a single dominant non-indigenous perspective [of] the value and management of the sites'.[131] He has also highlighted how the adoption of a multivocal approach has been more effective across Micronesia and Sri Lanka.[132]

The other great difficulty, once more, relates to the multiple-value nature of UCH. While educating the community or enhancing its sense of buy-in with local heritage could increase the 'share' of value they enjoy over the heritage, it might be difficult in many cases for the total value enjoyed by coastal or maritime communities to eclipse that of external communities and future generations. As with national governments, explored in Chapter 4, any significant difference in cost-benefit allocation may cause the local community to prioritise short-term gain for the community, above the long-term interests of those outside the community. As Maarleveld replied, the difficulty with local or subnational-led governance is that coastal communities are equally, if not more, disengaged with the distant valuations of local heritage.[133] He responds, 'even in a municipality at the sea coast, it's not the sea beyond the horizon that is important, but it's the traffic lights in the centre of the city.'[134] At the UCH policy workshop in Ghent in 2015, attendees were also discussing the same challenges which arise by protecting UCH through federalised and decentralised polities, wherein the lower levels have the freedom to choose whether or not to protect heritage of importance to others.[135] Nevertheless, education and buy-in of the local community will still only improve upon this issue, by considerably narrowing or even closing the gap between the costs and benefits of protecting heritage.

[131] Supra n. 102, Jeffery and Palmer, at p. 172.
[132] Parthesius, R. and Jeffery, B., (2012), 'Building Country-Relevant Programmes to Support the Implementation of the UNESCO Convention on the Protection of Underwater Cultural Heritage 2001', in *European Archaeology Abroad: Global Settings, Comparative Perspectives*, S.J. van der Linde, M.H. van den Dries, N. Schlanger and C.G. Slappendel (Eds.), 267-286, Sidestone Press (Leiden).
[133] Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File.
[134] Ibid.
[135] DeRudder, T. and Maes, F. (Eds.), (2015), *Workshop: The Legal Protection of Underwater Cultural Heritage 23 April 2015 – Final Report*, Maritime Institute, University of Ghent (Ghent), (at: http://www.vliz.be/imisdocs/publications/ocrd/274121.pdf; accessed 8 January 2019), at p. 16.

Overall, therefore, the community approach simply cannot be used in isolation, but must be thoroughly integrated with more effective co-regulation from the 'higher' levels. Such co-regulation can not only be crafted to more effectively and efficiently facilitate such programmes and to achieve collaboration among all partners, but can more forcefully regulate issues where the community level cannot cope. For example, a strong and respected legal system and infrastructure is needed to properly enforce against those looters and free riders that do not 'buy in' to the abstract values of UCH. Co-regulation is also needed to steer the community to protect sites which continue to be of less value to them than they are to external communities; in other words, to protect UCH as an externally socio-psychologically valued asset when faced off against the community's internal desire for economic development.

(b) Community Incentivisation

As has been demonstrated, the community buy-in approach, which emphasises education of a community to expand its ability to enjoy the abstract values from UCH sites, can only go so far. Recognising the importance of sites is necessary; but, in several cases, will not alone be sufficient. As suggested, if too much 'value' of UCH protection is delivered to external communities then there is a routine risk of a shortfall in cost-benefit calculation for local communities when considering whether to invest in its stewardship. Not all in the community will be as receptive to archaeological, social, aesthetic or educational values of UCH. For many, it could remain an object of potential (and usually nominal) economic value and little else. Furthermore, when competing with other socioeconomic priorities of the local community, the intangible values of the heritage will have a limited impact. As Ooms put it in interview, with regard to land-based pollution from agriculture, even though 'you have to solve it' with local communities, 'if they are getting all their money from the agriculture, then it is difficult of course'.[136]

Similar issues are experienced, therefore, with the shortfall in motivation for protecting UCH. As Jeffery and Palmer say, 'effective management of a large number of shipwrecks is a daunting and expensive task for any country and in particular for the developing countries of the Pacific. In this context it is of prime importance to [make such management] *beneficial* to local people.'[137] Similarly, an empirical study by Vander Stoep, Kenneth and Tolson found that avocational divers 'with their passion, skills, and

[136] Ooms, E., (2018), Interview with Erik Ooms, 27 February 2018, Transcript on File.
[137] Supra n. 102, Jeffery and Palmer, at p. 176.

sometimes access to equipment – can be invaluable partners' in discovering and studying UCH.[138] However:

> '[T]hey have other responsibilities, paying jobs, and limited time. And they are more likely to choose, during their valuable leisure time, the most exciting activities (e.g., diving vs. tedious data entry) and the most exciting wrecks. They cannot be "dumped on" or simply "used". Government partners must also bring something to the partnership table, even if in non-traditional forms.'[139]

The study demonstrated that, while content to engage in public objectives surrounding UCH, recreational divers expected some form of *incentivisation* for discovering, assessing, or protecting UCH, with proposals from interviewees including tax breaks, provision of support facilities, formal recognition (including attribution or publicity), preservation of intellectual property rights, or other financial incentives such as launch and dockage fee waivers.[140]

The study by the Maritime Archaeology Trust into Heritage Partnership Agreements in 2015, highlighted above, also came to similar conclusions, saying that the 'main reason for the lack of sign-ups, based on the feedback from groups involved, was twofold and revolved around the selection of sites, and the incentivisation of work'.[141] Many therefore drew comparisons with the Environmental Stewardship scheme by Natural England which offers financial rewards for participants.[142] Indeed, such meaningful incentives are perhaps more commonplace in the environmental context. For example, a core aspect of the Common Fisheries Policy has been the development of a large European Maritime and Fisheries Fund to help finance 'transition to sustainable fishing' and to incentivise 'coastal communities in diversifying their economies' away from unsustainable

[138] Vander Stoep, G., Kenneth V. and Tolson, H., (2002), 'Shipwreck Management: Developing Strategies for Assessment and Monitoring of Newly Discovered Shipwrecks in a Limited Resource Environment', in *Proceedings of the 1999 International Symposium on Coastal and Marine Tourism: Balancing Tourism and Conservation: April 26-29, 1999 Vancouver, British Columbia, Canada*, J. Auyong, N.P. Hadley and M.L. Miller, 125-136, Washington Sea Grant (Seattle), at p. 134.
[139] Ibid, at p. 134.
[140] Ibid, at pp. 134-135.
[141] Supra n. 121, at p. 19.
[142] Ibid, at p. 21; Franks, J.R. and Emery, S.B., (2013), 'Incentivising Collaborative Conservation: Lessons from Existing Environmental Stewardship Scheme Options', 30(1) *Land Use Policy* 847-862.

practices.[143] Altvater also discussed a scheme in the Baltic for compensating coastal farmers by setting them up with a more sustainable mussel farming business.[144]

Such community incentivisation schemes would therefore perhaps take the form of 'cultural services': being the cultural heritage equivalent of 'environmental services', discussed in Section 3 above.[145] By the creative design of co-regulatory solutions, regulators are – whether operating at the local, national or regional scale – capable of addressing this shortfall by providing more meaningful *value* or compensation to the community. This is a subject which clearly needs future research in the area of UCH protection, particularly addressing the creative types of sustainable business or systems of incentivisation for marine and coastal communities which may be available. Nevertheless, there are some existing examples. Perhaps the most prevalent among these is the widespread use of reporting incentives in most national legal systems, which provide an element of incentive for communities (or even reprimand for failing) to report new UCH discoveries.[146] In many senses, this could be likened to a form of meta-governance designed to encourage coastal and maritime communities to act in the public interest in recording and protecting discovered sites, in exchange for some compensation. Such incentivisation also need not be limited to "local" communities either: although there might be initial challenges in design and implementation, a more detailed system which strongly incentivises fishing communities or certain maritime sectors, such as shipping, salvage, construction, mining, renewables, and shipbroker industries to take a proactive approach to site reporting, monitoring and enforcement, or to reporting suspicious activities or engage in whistleblowing, would probably also be very effective.[147]

[143] European Parliament, (2014), Regutlation No. 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund (EMFF), 20 May 2015, 149 *Official Journal of the European Union* 1-66.
[144] Supra n. 69, Altvater.
[145] Supra n. 92. Not to be confused with the ecocentric view of 'cultural services' which merely refers to the cultural benefit of ecosystems but, rather, shifting this to mean the socio-ecological benefits of cultural systems.
[146] See generally, Dromgoole, S. (Ed.), (2006), *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, Martinus Nijhoff (Leiden).
[147] Flemming, N.C., Çağatay, M.N., Chiocci, F.L., Galanidou, N., Jöns, H., Lericolais, G., Missiaen, T., Moore, F., Rosentau, A., Sakellariou, D., Skar, B., Stevenson, A., Weerts, H., (2014), *Land Beneath the Waves: Submerged Landscapes and Sea Level Change – A Joint Geoscience-Humanities Strategy for European Continental Shelf Prehistoric Research*, N.C. Chu and N. McDonough (Eds.), Position Paper 21, European Marine Board (Ostend), at p. 61.

Instead of cultural services, perhaps the most dominant form of community incentivisation which has been achieved in the protection of UCH so far is through the medium of ownership. Contrasting with the *sense* of community ownership, highlighted in subsection (a) above, this relates to the use of formal and legal rules to provide some element of *actual* ownership over in situ UCH: whether that be ownership of the UCH site itself, the part of the sea where it is found, or over the means of accessing it. As was highlighted above, private property ownership is an inherently unattractive and unsuitable model of management for UCH which is, in effect, a public good and which would be systematically prone to undervaluation and underproduction. However, not all forms of legal ownership necessitate private dominion and the exclusion of the public interest; and property laws are entirely capable of being crafted or moderated to prevent externalities where private owners hold goods effectively in the public domain. A good example is the world-famous collection of *Titanic* artefacts raised by RMST Inc. throughout several expeditions in the late 20th Century. While the nature and motives of the original recovery projects have been subject to critique, at least the US District Court of the Eastern District of East Virginia, particularly through the guided input of NOAA, were able to secure the entire collection within a detailed and strictly provisioned system of conditions and covenants which have effectively ensured that the collection has remained in the public domain and protected for external beneficiaries and future generations.[148]

If local, coastal or maritime communities can more effectively control and monitor the *access* to UCH and protect it thereby, then carefully designed co-regulation can enable them to monetise the chokepoint in a manner that financially incentivises them to ensure long-term protection of the site for the public benefit.[149] There is no reason that these ownership rights cannot be even privately held by individuals, as opposed to communities, provided that the same are properly regulated to ensure that the UCH is maintained and monetised exclusively for public enjoyment. Perhaps the best example of this has been by the licensing of local dive clubs and giving them exclusive legal rights over access to UCH sites on the condition that they protect them and maintain them for

[148] Aznar, M.J. and Varmer, O., (2013), 'The Titanic as Underwater Cultural Heritage: Challenges to its Legal International Protection', 44(1) *Ocean Development & International Law* 96-112, at pp. 99-100.
[149] Cornes, R. and Sandler, T., (1996), *The Theory of Externalities, Public Goods, and Club Goods*, 2nd Edn, Cambridge University Press (Cambridge), at pp. 277-279; Supra n. 3, Ostrom (1990), at p. 38; Cafaggi, F., (2012), 'Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'', 23(3) *European Journal of International Law* 695-718, at pp. 703-710; Supra n. 82, Kaul, Grunberg and Stern, at p. 491.

public access. A recent UNESCO Report stresses the benefits of a system like this, where it was recently trialled in Croatia.[150] The report adds that dive clubs would:

> 'guarantee, by contract, the control of the integrity of the site and monitor it regularly with a certified underwater archaeologist. This system does not only help to finance underwater archaeology. It also permits more fragile sites to be opened up to the public without compromising their protection. Moreover, it engages the dive community more closely, encouraging divers to take care of 'their own' sites.'

The disadvantages to such a solution, provided that meta-regulation is properly designed, seem difficult to find. The success of protecting the *Lady Darling* wreck, as was noted earlier, was partly by giving the local fishing community a greater sense of ownership, by laying a plaque in thanks to their discovery and report of the site; but was likely significantly driven by a system of exclusive permits which local dive companies would purchase from the government.[151] Viduka also provides the example of a highly successful 'user pays' system at the popular *Yongala* wreck dive site in Australia, where diving companies apply for permits which contain conditions and rules enabling them to maintain the ongoing business.[152] This has even led to dive companies duly reporting all criminal activities or interference, even by their own customers.[153] However, such a system would clearly be bolstered by expanding the sense of community engagement and value, as explored in subsection (a). As Altvater said in interview, while community incentivisation is important, 'good ideas are failing, and some regulations are not effective, because there's no real interest to implement them.'[154]

This can be witnessed clearly in the case of the Chuuk Lagoon. Here, although a significant income is delivered for the local community by imposing an 'innovative' dive

[150] UNESCO UCH Secretariat, (2013), 'The Benefit of the Protection of Underwater Cultural Heritage for Sustainable Growth, Tourism and Urban Development', UNESCO (Paris), (at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UCH_development_study_2013.pdf; accessed 1 May 2019).
[151] Supra n. 130, Nutley.
[152] Viduka, A., (2006), 'Managing Threats to Underwater Cultural Heritage Sites: The Yongala as a Case Study', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 61-63, ICOMOS (Paris).
[153] Ibid, at p. 63.
[154] Supra n. 69, Altvater.

fee through a system of permits and local guides,[155] most of the Chuukese still 'lack a personal connection or an emotional attachment to the sunken military vessels. This is problematic for law enforcement as locals are reluctant to be proactive in the protection of Chuuk's 'Ghost Fleet'.'[156] Similarly, Barbash-Riley notes the difficulties of protecting a 'resource that involves a multitude of local, national, and global stakeholders with limited human and financial resources and technical expertise.'[157] She adds that, 'in this era of austerity, we can expect all governments – both of developed and developing countries – to increase the horizontal outsourcing of their responsibilities to nonstate actors'.[158] As such, she recommends that the Dominican government responds to these 'administrative and financial challenges by authorizing a management framework that allocates responsibilities among domestic and foreign state and nonstate actors'.[159] This includes the 'larger, more equitable, and longer-lasting economic benefits' of converting UCH into a 'Living Museum of the Sea',[160] as well as empowering communities 'in a bi-directional way', which might be referring to a co-management approach as highlighted in Section 3.[161] However, she does not satisfactorily or clearly justify why communities are needed to protect UCH, merely implying that it is because national governments are prone to corruption and treasure hunting: despite the fact that local communities are just as prone to treasure hunting, if not more so.

In other words, there is a serious lack of detailed and empirical research examining the true capacities, benefits and weaknesses of relying on community-led management or protection of UCH sites, whether by incentivisation through cultural services arrangements or by legal forms of ownership.[162] By pinpointing examples from existing case studies on UCH management, the benefits and advantages have been demonstrated with great clarity above. However, it appears that in all cases, effective co-regulation is needed to set the boundaries and rules of such community governance and to properly engage the community with the long-term benefits of such approaches. As with the

[155] Dromgoole, S., (2006), 'Editor's Introduction', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), xxvii-xxxviii, Martinus Nijhoff (Leiden), at p. xxxvii.
[156] Browne, K.V., (2014), 'Trafficking in Pacific World War II Sunken Vessels: The 'Ghost Fleet' of Chuuk Lagoon, Micronesia', 3(2) *GSTF International Journal of Law and Social Sciences* 67-74, at p. 72.
[157] Barbash-Riley, L., (2015), 'Using a Community-Based Strategy to Address the Impacts of Globalization on Underwater Cultural Heritage Management in the Dominican Republic', 22(1) *Indiana Journal of Global Legal Studies* 201-240, at pp. 207-208.
[158] Ibid, at p. 240.
[159] Ibid, at p. 204.
[160] Ibid, at p. 204.
[161] Ibid, at p. 234.
[162] Ibid.

demands for regime-building at the global and regional level, in Chapters 6 and 7, the need for further regimes at the community level would therefore also be a suitable area for future research.

(c) Collaborative Governance

i. Multi-stakeholder approaches

It is finally worth briefly acknowledging another critical pathway towards community protection of UCH undertaken by communities through reflexive processes such as *collaborative governance*. As explored above, although there is considerable overlap and contradiction between the growing bodies of research on community governance, it appears clear that 'collaborative' or 'new' environmental governance would be witnessed by facilitating true dialogue between all the key stakeholder groups and allowing them to negotiate collective preferences and to 'set the rules' for future management.[163]

As Manders also put it in interview:

> 'The management of cultural heritage . . . is what the Convention is about, or should be all about […]. It's about managing. It's about balancing values. So, it means that in situ preservation is one part of the management strategies and methods, but excavation is another one. What do we do or what don't we do? Just ask the people!'[164]

Such inclusive negotiations have the capacity to more accurately reach the Pareto frontier, allowing for the wider set of collective preferences to more accurately determine allocation of rights and wrongs, as well as align the overall governance framework. As Flatman appealed in 2012, with regard to competing sectors in the offshore environment, what is needed is 'a holistic view, global in scope, comprehensive in consideration. The provision of and continuance of energy supplies and other essential resources, and the control and reduction of climate change are intimately interlinked, not least of all in their impact upon cultural heritage.'[165]

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[163] See Section 2.
[164] Supra n. 100, Manders.
[165] Flatman, J., (2012), 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy', in *Archaeology in Society: Its Relevance in the Modern World*, M. Rockman and J. Flatman (Eds.), 167-192, Springer (New York), at p. 187.

There are numerous challenges to taking such an inclusive approach, as highlighted in Section 2 above,[166] but there are significant advantages. In particular, by developing normative frameworks and new systems from the bottom up, with the central role of stakeholders, it is possible to achieve a more efficient use of resources, a better common consciousness among the group, and enhance the legitimacy and efficacy of agreed norms. For example, Ringer has discussed how the Chippewa tribe in Quebec felt a strong spiritual connection and sense of stewardship over the prehistoric Mnjikaning fish weirs at Atherley Narrows. However, it was through collaboration between the Chippewas and other interested stakeholders that the Mnjikaning Fish Fence Circle was created, 'composed of representatives of the Chippewas, local municipal governments and historical associations, residents of the area and Parks Canada'.[167] A similar story can be found in the successful outcome of the *Lady Darling* wreck, noted above, where Nutley has stressed the critical role of a collaborative partnership between the 'local dive industry, local council, other key interest groups as well as the State Government through the NSW Heritage Office and the Australian Government through the Historic Shipwrecks Program'.[168] In both these examples, therefore, the communities themselves were shown to be effective at creating their own rules and systems of protection from the bottom-up, without the need for intensive external rule-making or scrutiny.

ii. Collaborative governance through transboundary marine spatial planning

A highly illustrative way to demonstrate the many potential benefits of community governance over UCH, which is initiated and driven by stakeholder collaboration, is by examining the potential value of marine spatial planning (MSP). MSP is an increasingly central aspect of integrated ocean governance, with a good definition provided by the MSPP Consortium, which referred to it as an 'integrated, policy-based approach to the regulation, management and protection of the marine environment, including the allocation of space, that addresses the multiple, cumulative and potentially conflicting uses of the sea and thereby facilitates sustainable development.'[169] Its overarching aim is thus overcoming the harmful and fragmentary effects of siloed decision-making across marine sectors, by 'facilitating the balancing of sectoral interests with the aim of

[166] See supra nn. 46-53.
[167] Ringer, R.J., (2006), 'Atherley Narrows Fish Weirs', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 44-45, ICOMOS (Paris), at p. 44.
[168] Supra n. 130, Nutley, at p. 34.
[169] MSPP Consortium, (2006), *Marine Spatial Planning Pilot – Final Report*, DEFRA (London), (at http://www.abpmer.net/mspp/docs/finals/MSPFinal_report.pdf; accessed 1 May 2019), (emphasis added).

achieving sustainable use of marine resources and optimizing the use of marine space.'[170] In effect, therefore – whether conducted at local, national, subregional, or regional scales – MSP is about bringing together the various stakeholders and sectors with an interest in the maritime space and encouraging them to resolve conflicting plans over the spatial allocation of activities and to solve common problems.

While there is a general lack of research detailing the motivations and benefits of MSP – with the exception of a report by Firth in 2013, focusing predominantly on national-level and top-down MSP,[171] and a current pilot project in the Baltic, focused on improving communication between heritage conservationists and other ocean stakeholders[172] – there is a strong argument in favour of UCH being effectively included within such MSP projects, particularly at the transboundary level. As Aznar responded in interview, 'MSP is a multilayered tool which may assist . . . the protection of UCH in regional seas. Including cultural, fishing, environmental, energy, tourism and coastal development issues in the same web is necessary to offer holistic approaches to that protection.'[173] Each Ooms, Altvater and De Vrees also confirmed that UCH would be much more likely to receive better protection as a result of its inclusion within MSP processes. Similarly, Firth responded that transboundary MSP 'would be a good way forward and I think there's a lot of scope there.'[174] Indeed, in 2008, Gilliland and Laffoley had already identified the 'need for more recognition of cultural heritage' in MSP processes, saying that 'whilst it is very challenging, objectives should be identified for the *full suite* of economic, environmental, and social interests'.[175]

The interesting question, however, is *why* it would assist UCH protection by including it within MSP: a question which experts in this area have yet to really get to the bottom of.

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[170] Platjouw, F.M., (2018), 'Marine Spatial Planning in the North Sea – Are National Policies and Legal Structures Compatible Enough? The Case of Norway and the Netherlands', 33(1) *International Journal of Marine and Coastal Law* 34-78, at p. 35; Schaefer, N. and Barale, V., (2011), 'Marine Spatial Planning: Opportunities & Challenges in the Framework of the EU Integrated Maritime Policy', 15(2) *Journal of Coastal Conservation* 237-245, at p. 238; Jentoft, S. and Knol, M., (2014), 'Marine Spatial Planning: Risk or Opportunity for Fisheries in the North Sea?', 12(1) *Maritime Studies* 13-28, at p. 16; Douvere, F., (2008), 'The Importance of Marine Spatial Planning in Advancing Ecosystem-Based Sea Use Management', 32(5) *Marine Policy* 762-771, at p. 765.

[171] Firth, A., (2013), *Marine Spatial Planning and the Historic Environment*, English Heritage Report No. 5460, Fjordr Ltd (Salisbury).

[172] BalticRIM, 'Integration of Maritime Heritage in the Maritime Spatial Planning of the Baltic Sea', (at: https://www.submariner-network.eu/projects/balticrim; accessed 1 May 2019).

[173] Supra n. 97, Aznar.

[174] Supra n. 73, Firth.

[175] Gilliland, P.M. and Laffoley, D., (2008), 'Key Elements and Steps in the Process of Developing Ecosystem-Based Marine Spatial Planning', 32 *Marine Policy* 787-796, at pp. 792 and 795 (emphasis added).

The first and most obvious motivation, for example, would be to enable maritime sectors to have a greater knowledge of where their activities might directly threaten or incidentally harm known UCH sites. As Maes said in his written response, 'transboundary or national MSP is important for the protection of UCH by introducing an exclusion zone around an UCH spot for other activities beyond those mentioned in the UNESCO Convention (related to in situ protection), such as prohibiting beam trawling and regulating diving activities'.[176] Similarly, Varmer has said MSP would help address threats which could inadvertently harm UCH, as well as designate traffic lanes and no-anchorage areas.[177]

Seen from this initial minimalist perspective, however, the need to include communities in negotiations over the protection of UCH in shared ocean spaces seems modest. Indeed, if such sites are mapped out by public authorities and any protected areas are effectively communicated through top-down law, there should be little need for stakeholders to get together. Ooms appears to take such a view in his response when he urged caution towards the concept of including UCH comprehensively at the transboundary planning level. He proposed, instead, that one has 'to look at transnational issues which are most relevant', such as energy infrastructure, shipping, fishing, and marine protected areas, given that these have a clear need for coordinating spatial activities.[178] Unfortunately, this first motivation does not deal with the fact that – as was explored in Chapter 4 – the major threat to UCH is from the very lack of prioritisation from governments and the lack of legal rules in the first place, as well as the clear lack of knowledge and understanding about much of UCH's precise locations and values among the key stakeholders. As Peeters responded, 'I am not convinced that . . . in situ preservation is feasible. There are far too many gaps in our knowledge. In order to (partially) fill the gaps, research is necessary, but a systematic survey of an area like the North Sea is impossible.'[179]

A second motivation for including UCH in MSPs, therefore, could be by the development of a stronger sense of empathy towards UCH and its plight, through a common consciousness of the cumulative impacts within a shared social-ecological system. Indeed, it was noted in Chapters 2 to 5 how UCH has often suffered from an 'out of sight, out of mind' mentality, where the lack of awareness of its true in situ values, its threatened

[176] Supra n. 128, Maes.
[177] Supra n. 135, DeRudder and Maes, at p. 7 (per Varmer).
[178] Supra n. 136, Ooms.
[179] Peeters, H., (2018), Written Response of Hans Peeters, 28 April 2018, Filed with Author.

status, or even of its very existence, can lead to systemic deficiencies in terms of the legal and social norms protecting it. Under this heading of motivation, the inclusion of UCH within transboundary MSP processes would provide a much-needed opportunity to influence the actual decision-making and adjust the future negotiating positions of maritime and industry sectors, or public agencies, having an impact on UCH. Regular updates could be communicated to wider sectors about the values and threats to nearby UCH; where its protection has reaped rewards; the mutual or compassionate gains to be obtained by its protection; and where a lack of protection has diminished the multiple values now available for present and future generations. As demonstrated when discussing pathways to more effective regional regimes, in Chapter 7, those regions with a stronger sense of 'shared heritage' will have a stronger incentive to cooperate, because they feel a stronger collective consciousness and more readily see the mutual benefits to cooperation.[180]

Similarly, it was accepted by a number of respondents in this study that a difficulty for UCH was the lack of awareness among competing marine sectors with the true concerns or values of UCH protection, which can be better addressed by bringing these sectors together.[181] This weakness of inter-sectoral fragmentation in terms of UCH protection is therefore witnessed beyond the MSP context. For example, in interview Guérin pointed out the challenges of engaging sectors with UCH protection at international conferences on the marine environment. She adds, 'we have to do much more to promote collaboration when we talk about ocean space preservation: that we speak not only about pollution and sea level rising. […] It's certainly an issue and we have to scream the word "heritage" much more loudly into the ocean space.'[182] Maes responds, for example, that collaboration through MSP was vital for engaging politicians in Belgium with the importance of improving UCH protection.[183] Similarly, Altvater relays how regional MSP builds knowledge and a 'community feeling' among stakeholders and notes the importance of *communicating* to competing activities – such as shipping, fishing, and tourism – about the impact they have on heritage.[184]

[180] See Chapter 7.
[181] De Vrees; Supra n. 69, Altvater; Supra n. 136, Ooms.
[182] Supra n. 96, Guérin.
[183] Supra n. 128, Maes.
[184] Supra n. 69, Altvater.

However, this motivation for including UCH within MSP – the ability to communicate its importance to other stakeholder groups – does not tell the full story or address the potential of using MSP as a means to protect MSP. Instead, its true potential becomes clearer once it is recognised that MSP is, in effect, merely a system for facilitating highly inclusive multi-stakeholder and multi-sectoral collaborative governance across sectors and regional communities. This third and all-important motivation recognises that highly inclusive collaboration stimulates not just effective problem-solving, coordinated effort, co-benefit development, resource integration, cross-fertilisation of ideas, innovation, and the efficient co-location of activities between sectors, but can also unearth and resolve latent conflicts and misunderstandings between competing sectors through full and ongoing dialogue, enabling better alignment of objectives and the establishment of enduring systems for collaboration and communication.

Thus, MSP is widely heralded as an integrative process between conflicting maritime sectors through its capacity to properly explore, understand, and address conflicts, misunderstandings, and underlying interests between conflicting interest groups.[185] Ritchie and Ellis go so far as to say that MSP is 'the main fora for mediating conflicts of understanding and emphasis' in marine governance.[186] Similarly, for Jentoft and Knol, this propensity to resolve conflict is precisely what deems MSP as necessary at the local community level.[187] Many commentators commend this aspect of its processes, which create a vital foundation for future ongoing inter-stakeholder communication and collaboration. As the EU Commission reported, 'without any MSP in place, the increased risk of spatial conflicts between expanding maritime uses . . . may result in a suboptimal combination of growth and sustainability.'[188] Adding that an 'open debate must take place between the different sectors in order to identify conflicts and a means of coexistence between them.'[189] As Jay says, MSP 'directs attention beyond borders, in order to avoid conflicts with neighbours [and] make best use of shared or adjoining

[185] Supra n. 45, Calado et al, at p. 382; Flannery, W., O'Hagan, A.M., O'Mahony, C., Ritchie, H. and Twomey, S., (2015), 'Evaluating Conditions for Transboundary Marine Spatial Planning: Challenges and Opportunities on the Island of Ireland', 51 *Marine Policy* 86-95, at p. 86; Ellis, G. and Flannery, W., (2016), 'Marine Spatial Planning: Cui Bono?', 17(1) *Planning Theory and Practice* 122-128, at p. 125.
[186] Ritchie, H. and Ellis, G., (2010), 'A System that Works for the Sea'? Exploring Stakeholder Engagement in Marine Spatial Planning', 53(6) *Journal of Environmental Planning and Management* 701-723, at p. 717.
[187] Supra n. 170, Jentoft and Knol, at p. 22.
[188] Supra n. 45, European Commission, at pp. 2-3.
[189] Supra n. 45, European Commission, at p. 5.

resources'.[190] This goes right to the heart of the new marine governance movement, the 'essential quality' of which, as Jentoft and Chuenpagdee have suggested, is its capacity to mediate conflicts.[191]

As Altvater made clear in interview, *stakeholders* and their interests are the most fundamental aspect of the MSP process.[192] In other words, MSP is viewed ultimately as an 'interactive'[193] process of collaborative facilitation, wherein active stakeholder involvement 'is essential when looking for synergies and innovation and for making the goals and benefits of the process clear.'[194] This proclivity for reflexive interaction and collaboration towards resolving conflicting goals creates a space for crafting mutually beneficial solutions, as well as the strategic and efficient integration of effort and resources towards productively and positively solving problems and resolving competing interests.[195] As Pomeroy and Douvere have said, 'stakeholder involvement provides an opportunity to deepen mutual understanding about the issues at hand, explore and integrate ideas together, generate new options and solutions that may not have been considered individually and ensure the long-term availability of resources to achieve mutual goals.'[196] Such innovation and solution-searching also produces better planning by effective integration of local and special knowledge.[197] Moreover, collaborative facilitation as a part of MSP carries greater economic potential for all actors, by optimising resource allocation and the coordination of effort.[198]

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[190] Jay, S., Alves, F.L., O'Mahony, C., Gomez, M., Rooney, A., Almodovar, M., Gee, K., de Vivero, J.L.S., Gonçalves, J.M., da Luz Fernandes, M. and Tello, O., (2016), 'Transboundary Dimensions of Marine Spatial Planning: Fostering Inter-Jurisdictional Relations and Governance', 65 *Marine Policy* 85-96, at p. 85.

[191] Jentoft, S. and Chuenpagdee, R., (2015), 'The 'New' Marine Governance: Assessing Governability', in *Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?*, M. Gilek and K. Kern (Eds.), 15-34, Routledge (Abingdon), at p. 17.

[192] Supra n. 69, Altvater.

[193] Supra n. 170, Jentoft and Knol, at p. 22.

[194] Supra n. 45, European Commission, at p. 5.

[195] Burdon, D., Boyes, S.J., Elliott, M., Smyth, K., Atkins, J.P., Barnes, R.A. and Wurzel, R.K., (2018), 'Integrating Natural and Social Sciences to Manage Sustainably Vectors of Change in the Marine Environment: Dogger Bank Transnational Case Study', 201 *Estuarine, Coastal and Shelf Science* 234-247, at p. 243.

[196] Pomeroy, R. and Douvere, F., (2008), 'The Engagement of Stakeholders in the Marine Spatial Planning Process', 32(5) *Marine Policy* 816-822, at p. 816.

[197] Supra n. 185, Ellis and Flannery, at p. 125; Blæsbjerg, M., Pawlak, J.F., Sørensen, T.K. and Vestergaard, O., (2009*), Marine Spatial Planning in the Nordic Region - Principles, Perspectives and Opportunities*, Nordic Council of Ministers (Copenhagen), at p. 41; Innes, J.E. and Booher, D.E., (2004), 'Reframing Public Participation: Strategies for the 21st Century', 5(4) *Planning Theory & Practice* 419-436, at pp. 422-423.

[198] Supra n. 170, Schaefer and Barale, at p. 239.

Within a fluctuating and variable environment, with constantly interacting and shifting ecological reference points and stakeholder preferences, there is also a need for reflexive or adaptive forms of governance.[199] This can of course only be achieved by flexible, heterarchical, collaboration-driven models, as opposed to formal, hierarchised and top-down models.[200] As Jay et al have said, '[e]ngaging stakeholders and sea-users is regarded as a *critical* element of MSP both in guidance and practice, yielding benefits in terms of transparency, broadening the information and knowledge-base, setting mutually agreed goals to advance sustainable use of marine resources and improving decision making'.[201] Such approaches have thus allowed 'productive engagement with stakeholders and facilitated their cooperation in the identification of issues, pressures and opportunities, data provision, knowledge sharing, objective-setting and evaluation. They also set the tone for wider working between institutions and underscore the importance of developing strong relations between individual participants.'[202] Importantly, by enabling stakeholders to develop their own norms and processes of cooperation, it is imminently possible for collaborative governance networks to be created and to eventually witness the bottom-up migration of stakeholder-derived norms across regional or sub-regional contexts, instead of an exclusive reliance on top-down rules which may be less adaptable, responsive, efficient, effective, or socially legitimate.[203]

These very same benefits of transboundary MSP would be highly beneficial in the context of UCH protection, where more effective inter-sectoral collaboration might address the fact that UCH is viewed as an "obstacle" to national economic progression, in a far more time-efficient, cost-effective and co-beneficial manner. In their responses, both Maarleveld and Peeters recounted the numerous benefits available from development-led archaeology, which is continuing to expand in the marine context.[204] In particular, they explained how industry is open to contributing important finance and resources towards UCH research and protection, provided they have a clearer idea of what is needed from them and are therefore able to invest more effectively and prevent risk.[205] Industry therefore appears to yearn for more information on how heritage impact assessments are

[199] Supra n. 64.
[200] See Sections 1 to 3. Supra n. 196, Pomeroy and Douvere, at p. 816.
[201] Supra n. 190, Jay et al, at p. 91 (emphasis added). See also supra n. 196, Pomeroy and Douvere; Gopnik, M., Fieseler, C., Cantral, L., McClellan, K., Pendleton, L. and Crowder, L., (2012), 'Coming to the Table: Early Stakeholder Engagement in Marine Spatial Planning', 36(5) *Marine Policy* 1139-1149, at p. 1141; Supra n. 186, Ritchie and Ellis.
[202] Supra n. 190, Jay et al, at p. 93 (emphasis added).
[203] Supra n. 170, Jentoft and Knol, at p. 17.
[204] Supra n. 133, Maarleveld; Supra n. 179, Peeters.
[205] Ibid.

going to be carried out and what obligations are likely to arise.[206] As Bickett et al have said, this would be 'economically sensible from the perspective of developers who often seek to find added value through public relations and community engagement.'[207] In many senses, therefore, through proper integration and inclusion of all competing interests, one would be naturally driven towards the establishment of 'heritage offset' payment systems, much like the polluter pays principle for environmental degradation.[208]

Yet, it is conceivable that cooperation between industry and UCH conservationists can and will go further. For example, offshore construction, mining, dredging, fishery and shipping companies are all better-placed to design the most effective and efficient rules and systems for minimising impacts to UCH from their offshore operations; just as UCH conservationists are better-placed to propose mutually beneficial activities in response, such as the sharing of data or the minimising of cost and disruption to offshore projects. It is well known that collaboration between the dredging community and the UCH community has improved the systems for reporting finds and locating spots for UCH.[209] Bailey has also written of how collaboration between epistemic actors, government agencies and offshore sectors would lead to much better awareness, protection, and research on prehistoric sites in the North Sea.[210] This accords with what Ooms said in interview, that perhaps one of the greatest advantages that could be derived by taking a transboundary MSP approach to UCH protection is the sharing of ideas and best practices between usually competing sectors.[211] Dromgoole has taken a similar view, having noted that inter-sectoral cooperation 'can lead not only to improvements with respect to the day-to-day practicalities of management of UCH within the region, but also – through the

[206] Ibid; Coroneos, C., (2006), 'The Four Commandments: The Response of Hong Kong SAR to the Impact of Seabed Development on Underwater Cultural Heritage', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 46-48, ICOMOS (Paris), at p. 46.
[207] Bicket, A., Firth, A., Tizzard, L. and Benjamin, J., (2014), 'Heritage Management and Submerged Prehistory in the United Kingdom', in *Prehistoric Archaeology on the Continental Shelf: A Global Review*, A.M. Evans, J. Flatman and N.C. Flemming (Eds.), 213-232, Springer (New York), at p. 230.
[208] Supra n. 165, Flatman, at p. 174; Supra n. 147, Flemming et al, at p. 61.
[209] Firth, A., (2006), 'Marine Aggregates and Prehistory', in *Underwater Cultural Heritage at Risk*: *Managing Natural and Human Impacts*, Heritage at Risk Special Edition, R. Grenier, D. Nutley and I. Cochran (Eds.), 8-10, ICOMOS (Paris); Dellino-Musgrave, V., Gupta, S. and Russell, M., (2009), 'Marine Aggregates and Archaeology: A Golden Harvest?', 11(1) *Conservation and Management of Archaeological Sites* 29-42.
[210] Bailey, G., (2011), 'Continental Shelf Archaeology: Where Next?', in *Submerged Prehistory*, J. Benjamin, G. Bonsall, K. Pickard and A. Fischer (Eds.), 311-331, Oxbow (Oxford), at pp. 326-327.
[211] '[I]t's not about maybe solving it . . . but it's more about sharing best practices I would think' (supra n. 136, Ooms).

sharing of ideas, experiences and best practice – with respect to the general management techniques employed.'[212]

This could be equated with creating a space in which multiple stakeholders can develop new solutions and collectively raise standards through communication and collaboration. As Firth rightly points out, in terms of the potential for enhanced legitimacy from self-crafted rules among UCH stakeholder communities, while national legislation 'might appear to be stronger in terms of enforcement[;] policy that has been established consensually through engagement with the different parties might have a legitimacy that fosters implementation more readily in day-to-day decisions.'[213] The European Marine Board are in harmony with this view, suggesting that only when archaeology is integrated into the planning process from the beginning can 'effective cooperation between industry and science be achieved.'[214] Whereas, by comparison, '[o]verly restrictive regulations are perceived as burdensome by industry and are difficult to enforce.'[215] Pertinently, they add that, if through cooperation between industry and the heritage sector, further 'voluntary codes of practice can be developed, those engaged in offshore activities will report their finds more willingly, and costs of enforcement and restrictions will be reduced.'[216]

Resource and time efficiency can also be gained by such public-private partnering, including by collective problem-solving the most effective processes, as well as through the ability to merge existing systems and thereby avoid duplication. As Firth responds, given the lack of public funding available for heritage protection, there is perhaps a far greater opportunity to protect UCH through existing systems or processes which are presently focused on other public goods, such as through OSPAR (the international organisation for environmental impact coordination in the North-East Atlantic), through the present exploration of renewable energy farms on the Dogger Bank, or through likely imminent reforms of the UK and EU's fisheries policies following the outcome of the Brexit vote.[217] Naturally, of course, while such interweaving of UCH protection into

[212] Dromgoole, S., (2013), *Underwater Cultural Heritage and International Law*, Cambridge University Press (Cambridge), at p. 311.
[213] Supra n. 171, Firth, at p. 75.
[214] Supra n. 147, Flemming et al, at p. 61.
[215] Supra n. 147, Flemming et al, at p. 61.
[216] Supra n. 147, Flemming et al, at p. 61.
[217] Supra n. 73, Firth; 'Archaeologists at large can participate as "stakeholders" in innumerable consultations and events.' (Evans, A.M., Firth, A. and Staniforth, M., (2009) 'Old and New Threats to Submerged Cultural Landscapes: Fishing, Farming, and Energy Development', 11(1) *Conservation and Management of Archaeological Sites* 43-53, at p. 47-48 (per Firth)).

existing systems could deliver many efficiency gains, enhance political currency towards UCH protection, and minimise economic costs; such integration of different themes could only work by ground-level multi-sector collaboration. This also sets the groundwork for increased trust between sectors and establishes ongoing patterns of communication and cooperation.[218]

Such collaboration also creates a space for innovation and developing new win-win solutions or, at the very least, helping parties to recognise the mutual gains and losses from adopting the best course of action available to all.[219] As Maes said in interview, MSP creates a space for 'stakeholders and public participation', where they can discuss 'measures to be taken'.[220] Aznar responded that MSP assists policymakers in tailoring 'the best normative and institutional approach' for the protection of UCH.[221] Similarly, Peeters adds, 'economic stakeholders are willing to think about solutions with archaeologists, both in terms of planning and technological innovations to permit research when protection is impossible.'[222] He further indicates that a regional solution would mean working 'towards a common research approach and dedicated mutual involvement through input of expertise (and equipment).'[223] For Altvater also, there is a need to include UCH within blue growth strategies which is, in effect, a call to search for new 'integrated ways' of managing and protecting UCH which interoperates with other sectoral objectives.[224]

Importantly, as noted earlier, such MSP can also operate on local to regional scales, such that it could provide an important pathway to transnational regime-building and multi-stakeholder collaboration across subregional seas without sole reliance on the limited international-national system. This creates an opportunity for harmonised standards and rules, as well as better compliance with norms with stronger social legitimacy. As Maarleveld and Altvater both respond, one of the key challenges with achieving effective

[218] As Firth puts it in the context of UCH, 'Marine industries – and the authorities that regulate them – are getting used to archaeologists.' (Ibid, Evans, Firth and Staniforth, at p. 47, (per Firth)).
[219] E.g., The BalticRIM website notes how the project, being the first to thoroughly explore UCH in a transboundary MSP context, 'will create examples of win-win solutions between MCH assets, other maritime economic and environmental interests through collaborative planning and management pilot cases.' (BalticRIM, 'Baltic Sea Region Integrated Maritime Cultural Heritage Management', (at: https://www.submariner-network.eu/projects/balticrim/about-balticrim; accessed: 1 May 2019).
[220] Supra n. 128, Maes.
[221] Supra n. 97, Aznar.
[222] Supra n. 179, Peeters.
[223] Supra n. 179, Peeters.
[224] Supra n. 69, Altvater.

standards of protection in a regional context is that each state has its own view and approach on how UCH should be treated.[225] Similarly, Ooms notes the challenges of dealing with different approaches and priorities between national agencies; some are more focused on ecosystem-based approaches, others on blue growth strategies; some are more top-down, whereas others are stakeholder-led; and so on.[226] Regional inter-sectoral collaboration therefore overcomes the weaknesses inherent from each sector or agency using their own types of data or having their own forms of dialogue and values, eventually leading to common standards and, eventually, to common rules.

Ooms noted how it is visibly apparent that large organisations in marine activities, who are inherently transnational themselves, also act as a harmonising process by gently pushing all operators towards common standards and approaches.[227] As Salter, Murphy and Peters add, therefore, cross-border collaboration between industry and archaeology can 'ensure consistent approaches to research and management [which] is essential.'[228] This thus significantly improves upon the fragmentation inherent in the marine governance system highlighted in Chapters 3 to 5, while going considerable distances to providing proper multi-level integration across the marine environment. Altvater emphasises this issue quite strongly, saying how different sectors 'have different data, different kinds of meeting, different people', but that regional MSP 'brings them all together.'[229] She adds that we 'already have a lot of rules in place, but the thing is that we're not really [complying,] many are contradictory, and many are not really effective. So, this is the issue we have to solve in our next step [and] think about how to break it down to . . . sea basin needs.'[230] The ultimate objective, as she sees it, is to go beyond broader marine plans which can be very general and 'overall', and to really 'integrate detail' into the specific rules for protection.[231]

In 2017, van Tatenhove therefore very aptly referred to transboundary MSP as a 'way of overcoming the "inefficiencies" that arise from fragmented governance regimes', by providing 'sectoral integration and incorporat[ing] hierarchical policies from different

[225] Supra n. 133, Maarleveld.
[226] Supra n. 136, Ooms.
[227] Supra n. 136, Ooms.
[228] Salter, E., Murphy, P. and Peeters, H., (2014), 'Researching, Conserving and Managing Submerged Prehistory: National Approaches and International Collaboration', in *Prehistoric Archaeology on the Continental Shelf: A Global Review*, A.M. Evans, J. Flatman and N.C. Flemming (Eds.), 151-172, Springer (New York), at pp. 154.
[229] Supra n. 69, Altvater.
[230] Supra n. 69, Altvater.
[231] Supra n. 69, Altvater.

layers of government, offering opportunities for a more strategic and forward-looking framework for all uses at sea'.[232] Unsurprisingly, therefore, it is increasingly common to find statements or declarations highlighting the value of multi-stakeholder and multi-agency collaboration – whether locally, nationally, or regionally – if we are to effectively protect UCH. As Secci and Spanu say, 'measures should foster, define, and regulate collaboration among institutions (e.g., ministries, universities, research centers, policing authorities, etc.), between these institutions and the private sector (e.g., cooperative companies and consulting firms), and between institutions and the local communities.'[233] Leshikar-Denton also reminds us that cooperation is at the heart of the UNESCO Convention and that, by this, a 'policy of cooperation *among all stakeholders* is the key for success.'[234] As has been shown, however, such "cooperation" should not be understood – as it has been from a legal perspective – as a requirement for inter-national co-existence, but as a need for greater reflexive multi-stakeholder and multi-level collaboration.

5. Conclusion: A Community Governance Approach to Protecting Underwater Cultural Heritage

This chapter has brought forward a lot of research detailing the advantages and opportunities presented by the use of 'community-level' governance, i.e., the development by communities themselves of rules, systems, networks and organisations, whether operating locally, nationally, regionally, or transnationally. The chapter has also introduced interview feedback with UCH policy experts, as well as located examples from across the world of literature on UCH management, which all provide evidence that such community governance is likely to carry a number of important benefits in the future protection of UCH. While the chapter highlighted some of the inherent challenges which accompany such decentralised approaches to environmental governance, it also provided a lot of clear evidence to support the view that such difficulties are to be viewed as a necessary part of achieving fully integrated and effective transnational solutions to complex global public good challenges, rather than an argument against community empowerment and further decentralisation of governance.

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[232] van Tatenhove, J.P., (2017), 'Transboundary Marine Spatial Planning: A Reflexive Marine Governance Experiment?', 19(6) *Journal of Environmental Policy & Planning* 783-794, at p. 784.
[233] Supra n. 43, Secci and Spanu, at p. 32.
[234] Leshikar-Denton, M.E., (2010), 'Cooperation is the Key: We can Protect the Underwater Cultural Heritage', 5(2) *Journal of Maritime Archaeology* 85-95, at p. 93 (emphasis added).

Indeed, it has been evidenced that the pooling of capacities and interests, the utilisation of private resources, and the considerably improved compliance and reflexivity, all serve to address many of the compliance, fragmentation and public good production weaknesses explored in Chapters 3 to 5. It is also interesting to note the various examples, in both environmental and cultural heritage contexts, where a strengthened sense of community buy-in or ownership, as well as hardened forms of property rights, have all been instrumental in integrating effective private community protection into wider public objectives. Most significantly, it appears likely that communities can themselves design the 'rules of the game' by collaborating together across numerous scales, such that they develop new forms of group consciousness, new incentives and new systems for ongoing synergy and collaboration. One such process in the UCH context which can help to achieve such collaborative governance is through transboundary MSP, wherein numerous marine sectors and interests are brought together to craft win-win solutions and discuss common concerns and values.

It is clear, as noted above, that public policy can assist in facilitating and harnessing the power of the community, such as by constructing meta-regulation or co-regulation which brings together or empowers such stakeholder communities. It will be for future research to explore the design and achievement of such co-regulatory solutions in the protection of UCH. Instead, this thesis now turns to the concluding chapter to draw together the findings from across Chapters 1 to 9, suggesting that future research and policy development in the field of UCH protection must seek to promote the expansion of governance upwards, downwards and outwards from the nation state, towards greater transnational and multi-level solutions, whenever and wherever such integrated modes of governance are necessary.

Chapter 10

A Transnational Governance Approach to the Global Protection of Underwater Cultural Heritage

Chapter Abstract:

This chapter concludes the study by confirming its initial hypothesis that various aspects of transnational governance, as were explored in Chapters 6 to 9, have the potential to offer solutions to the weak levels of state compliance in the protection of underwater cultural heritage (UCH), as were explored in Chapters 3 to 5. It argues that international law and transnational law are capable of having a positive inter-relationship, where each can be utilised to strengthen the quality of the other. This suggests that one should pursue a dual international-transnational approach which promotes both the widespread ratification and implementation of intergovernmental framework rule systems, such as the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage, in parallel to significantly expanding and strengthening the role of NGOs, institutions, epistemic actors, corporations, individuals, and communities, all operating within multiple, overlapping and multi-layered transboundary governance networks. It also argues that, given how developments at the inter-state level have become increasingly lethargic, the expansion of local, regional and global institutions, agencies and regimes, as well as the empowerment of private and public-private communities by co-management and collaborative governance, should all now be pursued in earnest. The thesis then finishes by arguing that none of the challenges facing the achievement of transnational governance are insurmountable and that resolving them is a small price to pay in order to achieve more effective governance of global UCH protection.

1. Future Advantages of Underwater Cultural Heritage Protection by Multi-Level Governance

Given the vast breadth and depth of literature and theoretical assertions raised throughout this study, it would be impossible to tie up all loose ends and to provide a detailed evaluation of all the hypotheses and proposals which have been discussed. The principal focus of this concluding chapter will therefore be upon the study's main research questions, which sought to evaluate whether and how transnational governance could improve the global protection and management of underwater cultural heritage (UCH).

This first section spends a brief moment reflecting back on some of the key findings from across Chapters 1 to 9, highlighting how the traditional and horizontal model of international law – particularly enforced for UCH protection through the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention)[235] and the United Nations 1982 Convention on the Law of the Sea (LOSC)[236] – has displayed various weaknesses which can be addressed or ameliorated by the addition of actors, norms and networks beyond inter-state relations, operating at multiple levels of governance. The second section that follows then examines these findings in context, by exploring some of the important issues to consider when asking how such new transnational and multi-dimensional systems of governance can be achieved. Finally, the last section will briefly highlight some of the uncertainties and complexities which might arise if the findings from this thesis are to be adopted into policy, providing further inspiration and direction for future research.

The first two chapters of this thesis set the scene by examining and highlighting some of the features of the international legal system protecting UCH. There it was demonstrated that the UNESCO Convention has been effective at driving forward a culture shift and in addressing the primary threat to UCH, as of that time, which was commercially-exploitative treasure hunters and salvors.[237] By reappraising UCH through the lens of a multiple-value understanding of heritage, it was apparent that the UNESCO Convention's drafters were also correct to adopt a model which valued archaeological (preservationist) values above those of treasure salvors (opportunistic) values.[238] The early chapters also supported the widespread ratification of the Convention, by pointing to research which defends its value and utility to both coastal and flag states alike.[239] However, it was also clear from the research findings, and confirmed by expert interviews, that while the UNESCO Convention has helped to address threats to UCH from salvage laws, it did not

[235] UNESCO Convention on the Protection of the Underwater Cultural Heritage, (adopted 2 November 2001, in force 2 January 2009), 2562 UNTS 1.
[236] United Nations Convention on the Law of the Sea, (adopted 10 December 1982, in force 16 November 1994), 1833 UNTS 397.
[237] See Chapter 2. Manders, M., (2018), Interview with Martijn Manders, 15 February 2018, Transcript on File; Williams, M., (2018), Interview with Mike Williams, 18 June 2018, Transcript on File; Firth, A., (2018), Interview with Antony Firth, 15 March 2018, Transcript on File; Dromgoole, S., (2006), 'United Kingdom', in *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, S. Dromgoole (Ed.), 313-350, Martinus Nijhoff (Leiden), at p. 340; O'Keefe, P.J., (2014), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2nd Edn, Institute of Art and Law (Builth Wells), at pp. 124-125.
[238] E.g., Maarleveld, T.J., Guérin U. and Egger, B. (Eds.), (2013), *Manual for Activities Directed at Underwater Cultural Heritage: Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO (Paris), at pp. 20-41.
[239] See Chapter 1, Section 4.

have sufficient opportunity to address the arguably greater and still growing damage caused by other threats, such as looting, trophy hunting, offshore development, fishing and economic activity.[240]

However, Chapters 3 to 5 promulgated a considerable amount of scepticism and concern about the capacity of international law – as a legal *system* predicated on absolute equality between wholly independent "sovereigns" – to address such threats to UCH. By confirming that UCH protection fits within the definition of a 'global public good',[241] it argued that it will be difficult for nation states to agree to curtail their own economic advancement for the betterment of external communities when there is little in the enforcement architecture to overcome the consent-based nature of international law.[242] This capacity of states to freely consent to being bound by international norms therefore undermines collective action and leaves too much space for free riders and for low compliance.[243] These chapters also expressed concern about the overt reliance upon hortatory commitments between states to 'cooperate' in the protection of UCH, when such commitments are often reduced to a negative sum game of reactive cooperation, as opposed to a positive sum game of proactive collaboration and regime-thickening.[244]

These weaknesses were then explored in the broader context of the law of the sea, which confirmed that various features of the 'Westphalian' system of law, i.e., its horizontal

[240] Supra n. 237, Manders; Maarleveld, T.J., (2018), Interview with Thijs J. Maarleveld, 22 March 2018, Transcript on File; Aznar, M.J., (2018), Interview with Mariano J. Aznar, 12 February 2018, Transcript on File; Supra n. 237, Dromgoole, at p. 346; Flatman, J., (2012), 'What the Walrus and the Carpenter Did Not Talk About: Maritime Archaeology and the Near Future of Energy', in *Archaeology in Society: Its Relevance in the Modern World*, M. Rockman and J. Flatman (Eds.), 167-192, Springer (New York), at p. 174; Flatman, J., (2009), 'Conserving Marine Cultural Heritage: Threats, Risks and Future Priorities', 11(1) *Conservation and Management of Archaeological Sites* 5-8, at p. 7.

[241] See generally, Kaul, I., Grunberg, I. and Stern, M. (Eds.), (1999), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press (Oxford); Kaul, I., Conceição, P., Le Goulven, K. and Mendoza, R.U. (Eds.), (2003), *Providing Global Public Goods: Managing Globalization*, Oxford University Press (Oxford); Kaul, I. and Conceição, P. (Eds.), (2006), *The New Public Finance: Responding to Global Challenges*, Oxford University Press (Oxford); *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 1-18, MIT Press (Cambridge, MA).

[242] Bodansky, D., (2012), 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' 23(3) *European Journal of International Law* 651-668; Heal, G., (1999), 'New Strategies for the Provision of Global Public Goods: Learning from International Environmental Challenges', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 220-240, Oxford University Press (Oxford); Krisch, N., (2014), 'The Decay of Consent: International Law in an Age of Global Public Goods', 108(1) *American Journal of International Law* 1-40.

[243] Crawford, J., (2012), *Brownlie's Principles of Public International Law*, 8th Edn, Oxford University Press (Oxford), at p. 16; Guzman, A.T., (2011), 'Against Consent', 52(4) *Virginia Journal of International Law* 747-790; Besson, S., (2016), 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox', 29(2) *Leiden Journal of International Law* 289-316; Pergantis, V., (Ed.), (2017), *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives*, Edward Elgar (Cheltenham).

[244] See Chapter 3.

arrangement between absolutist, equal and zonal political units – have served to drive forward weak compliance and poor management in the marine environment.[245] This was clearly evidenced in the case of UCH protection and management, where large numbers of secondary sources and interview responses pointed to worldwide issues with compliance by states with their international commitments towards UCH.[246] It was not just the problem of poor implementation, but particularly the difficulty with providing states with sufficient incentive to curtail political or economic gains available elsewhere, in preference to the socio-cultural interests of an 'external' international community.[247] This has all too frequently led to treaties which are poorly adopted and which are drafted with considerable latitudinal ambiguity to prevent future constraint on national sovereignty.[248]

As Risvas once commented on the Convention's likely weakness in achieving cooperation and implementation by states, despite the fact that 'one of the primary objectives of the UNESCO Convention was to create a legal framework of cooperation by fleshing out UNCLOS Article 303(1), this effort has not been crowned with success.'[249] Similar responses were received by most of the UCH and marine policy experts interviewed during this study, who confirmed that commitment and compliance by states with the international protection of UCH will be challenging. This is particularly a result of states being able to agree with and implement – or disagree with and not implement – international laws according to their own motives or conscience. This is the nature of our inter-national law, where the focus of law is not on maximising law's diverse subjects and contexts; but on reducing law's influence solely to those marginal aspects of governance which national governments are willing to resign, often for some rational (or constructed) political or economic gain.

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[245] See Chapter 5.

[246] Supra n. 237, Williams; Supra n. 237, Firth; Supra n. 237, Manders; Sarid, E., (2017), 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges', 35(2) *Berkeley Journal of International Law* 219-261, at p. 256; MacKintosh, R.F., (2018), *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Implementation and Effectiveness*, University of Southampton, Doctoral Thesis.

[247] See Chapter 4.

[248] As the pre-eminent professor of international UCH law, Sarah Dromgoole, once put it, 'unless it is widely adopted by both flag states and coastal states – treasure hunters will be able to evade its control mechanisms by using "flags of convenience" and "ports of convenience". [It seems] that the Convention may be quite widely adopted by coastal states, but it seems unlikely that significant flag states, including the USA and UK, will sign. The holes that this will create in the protective system, together with the inevitable difficulties of enforcement . . . mean that the effectiveness of the Convention will probably be patchy at best.' (Dromgoole, S., (2003), '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 18(1) *International Journal of Marine & Coastal Law* 59-108, at p. 90).

[249] Risvas, M., (2013), 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', 2(3) *Cambridge Journal of International and Comparative Law* 562-590, at p. 584.

This is where Chapters 6, 7 and 9 examined whether the addition of rules, actors and systems outside of the inter-state legal bargaining process would assist in enhancing the protection of UCH. These chapters explored the potential merit of a more transnational approach to the international governance of UCH protection, by exploring the capacity for non-state actors and regimes to influence matters at the global, regional, and community levels. The conclusions to be drawn from these chapters are many and diverse, with several intriguing and beneficial questions and proposals left to be explored by future research.[250] Nevertheless, it was apparent that in each case – whether looking at the global, regional or local level – the addition of well-crafted transnational law should improve overall protection of UCH and drive up compliance with rules demanding its better preservation. In particular, both Chapters 6 and 9 explored the advantages obtained by further increasing the role of private and hybrid actors – such as non-governmental organisations (NGOs), epistemic communities, standards bodies, multinational corporations, subnational entities, communities, and stakeholders – in governance at the transnational level. In both cases, it was possible to find evidence and various examples of where such non-state actors have positively improved the protection of UCH, by side-stepping, influencing or complementing state-level protection.

For example, at the global level, numerous organisations and bodies – such as the International Council on Monuments and Sites (ICOMOS), International Law Association, International Maritime Organization, and various NGOs and epistemic actors – have improved the protection of UCH more than would otherwise have been possible through enforcement by state-based treaty making and customary law alone.[251] At the broader transnational levels, it was also demonstrated that private communities of stakeholders – such as local communities, economic sectors, and ocean users sharing the same geographical space – can be highly effective at driving forward protection of the historic and natural environment on behalf of humankind, if they are given sufficient buy-in or incentivisation, or by creating the right conditions for collaboration, communication and innovation.[252] By comparison with the command-and-control system of international and domestic law, such transnational communities and multi-level networks can carry

[250] See Section 3 below.
[251] See Chapter 6.
[252] See Chapter 9.

advantages in securing compliance,[253] routing free riders,[254] increasing efficiency,[255] lobbying governments,[256] and reflexively dealing with the 'wicked problems' and relational complexity of aggregate-effort global public goods.[257] All of this also serves to strengthen and reinforce state-based laws and systems protecting UCH, operating in a positive symbiosis between transnational and international regime-thickening.[258]

It should also be recalled that an essential characteristic of multi-level governance is its capacity to constrain or complement national-level regulation and thus to overcome collective action weaknesses within intergovernmental legal processes.[259] As Chapter 4

[253] E.g., Brousseau, E. and Dedeurwaerdere, T., (2012), 'Global Public Goods: The Participatory Governance Challenges', in *Reflexive Governance for Global Public Goods*, E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner (Eds.), 21-36, MIT Press (Cambridge, MA), at p. 31; Masten, S.E. and Prüfer, J., (2014), 'On the Evolution of Collective Enforcement Institutions: Communities and Courts', 43(2) *Journal of Legal Studies* 359-400; Mitchell, R.B., (1994), *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*, MIT Press (Cambridge, MA), at pp. 299–300; Papanicolopulu, I., (2012), 'The Law of the Sea Convention: No Place for Persons?', 27(4) *International Journal of Marine and Coastal Law* 867-874, at p. 872; Bodansky, D., Brunnée J. and Hey, E., (2008), 'International Environmental Law: Mapping the Field', in *The Oxford Handbook of International Environmental Law*, D. Bodansky J. Brunnée and E. Hey (Eds.), 1-28, Oxford University Press (Oxford), at p. 20.

[254] E.g., Johnson, N., Alessa, L., Behe, C., Danielsen, F., Gearheard, S., Gofman-Wallingford, V., Kliskey, A., Krümmel, E.M., Lynch, A., Mustonen, T. and Pulsifer, P., (2015), 'The Contributions of Community-Based Monitoring and Traditional Knowledge to Arctic Observing Networks: Reflections on the State of the Field', 1 *Arctic* 28-40; Abbot, J. and Guijt, I., (1998), *Changing Views on Change: Participatory Approaches to Monitoring the Environment*, International Institute for Environment and Development (London).

[255] E.g., Wälti, S., (2010), 'Multi-Level Environmental Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 411-422, Edward Elgar (Cheltenham), at p. 413; Calado, H., Bentz, J., Ng, K., Zivian, A., Schaefer, N., Pringle, C., Johnson, D. and Phillips, M., (2012), 'NGO Involvement in Marine Spatial Planning: A Way Forward?', 36(2) *Marine Policy* 382-388, at p. 385; European Commission, (2010), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Maritime Spatial Planning in the EU—Achievements and Future Development*, COM(2010) 771 Final, at p. 5.

[256] Keck, M.F. and Sikkink, K., (1998), *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press (Ithaca); Moghadam, V.M., (2005), *Globalizing Women: Transnational Feminist Networks*, 2nd Edn, Johns Hopkins University Press (Baltimore); van Tuijl, P. and Jordan, L., (2000), 'Political Responsibility in Transnational NGO Advocacy', 28(12) *World Development* 2051-2065; Sikkink, K., (2002), 'Transnational Advocacy Networks and the Social Construction of Legal Rules', in *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, Y. Dezalay and B.G. Garth (Eds.), 37-64, University of Michigan Press (Ann Arbor).

[257] E.g., Chaffin, B.C., Gosnell, H. and Cosens, B.A., (2014), 'A Decade of Adaptive Governance Scholarship: Synthesis and Future Directions', 19(3) *Ecology and Society* 56-68; Englender, D., Kirschey, J., Stöfen, A. and Zink, A., (2014), 'Cooperation and Compliance Control in Areas Beyond National Jurisdiction', 49 *Marine Policy* 186-194, at p. 187; Armstrong, J. H. and Kamieniecki, S., (2017), 'Strategic Adaptive Governance and Climate Change: Policymaking during Extreme Political Upheaval', 9(7) *Sustainability* 1244-1262; Perrings, C. and Gadgil, M., (2003), 'Conserving Biodiversity: Reconciling Local and Global Benefits', in *Providing Global Public Goods: Managing Globalization*, I. Kaul, P. Conceição, K. Le Goulven and R.U. Mendoza (Eds.), 532-555, Oxford University Press (Oxford), at pp. 535-536.

[258] See Sections 2 and 3 below.

[259] Van den Bergh, R., (2010), 'Private Law in a Globalising World: Economic Criteria for Choosing the Optimal Regulatory Level in a Multi-Level Government System', in *Globalization and Private Law: The Way Forward*, M. Faure and A. van der Walt (Eds.), 57-96, Edward Elgar (Cheltenham); Wälti, S., (2010), 'Multi-Level Environmental Governance', in *Handbook on Multi-Level Governance*, H. Enderlein, S. Wälti and M. Zürn (Eds.), 411-422, Edward Elgar (Cheltenham), at p. 416; Hilson, C., (2000), *Regulating Pollution: A UK and EC Perspective*, Hart (Oxford), at pp. 29-48; Hilson, C., (2018), 'The Impact of Brexit

detailed, the global public good nature of UCH protection makes it prone to externalities and, thus, to underproduction and deficient inter-state cooperation. Furthermore, its placement within the transnational ocean context, with its characteristically fluid borders and intensive interdependence between nations, further compounds these collective action difficulties. Multi-level governance is therefore a necessary model to manage these overspills (externalities) and underspills (internalities), so as to prevent regulatory races to the bottom and to provide states with sufficient incentive to drive forward their compliance with international norms.[260] One particular area where this has proven effective, as exemplified by the impressive level of subscription to environmental, consumer, employment, social and human rights systems across Europe, is by increasing the role, function, power and complexity of regional and continental networks and regimes. As evidenced in Chapter 7 – whether by multilateralism, supranationalism or transnationalism – the cultural and geographical proximity, lower collective action threshold, greater trust and goodwill, and lower common denominator effects, all make increased collaboration and cooperation across regional and sub-regional networks far more effectively than reliance on global inter-state treaties alone.

Thus, most of the respondents to this study, with the exception of two, expressed a positive response to the potential of regional regimes and agreements to significantly improve the protection of UCH. An analysis of existing literature also supported this view. As Maarleveld responded in interview, 'I am optimistic [because] I think that regional treaties will start to work.'[261] Research across Chapters 6, 7 and 9 therefore highlighted multiple advantages to exploring new means of governing UCH protection beyond the exclusive role of inter-state treaties and customary international law. In all cases, the ability of private and hybrid actors to drive up standards, pick up the slack in deficient public good provision and put pressure on states to comply or delegate in the governance of transboundary concerns, would all argue in favour of some further diminution and diffusion of exclusive state power outwards, downwards and upwards to wider multi-level governance regimes and networks. As Firth aptly responded to this study, 'the idea of having a multiple-layered approach is a good one.'[262]

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on the Environment: Exploring the Dynamics of a Complex Relationship', 7(1) *Transnational Environmental Law* 89-113; at pp. 106-108; c.f., Scharpf, F.W., (1997), 'Introduction: The Problem-Solving Capacity of Multi-Level Governance', 4(4) *Journal of European Public Policy* 520-538, at pp. 521-523.

[260] Ibid.

[261] Supra n. 240, Maarleveld.

[262] Supra n. 237, Firth.

2. Future Achievement of Underwater Cultural Heritage Protection by Multi-Level Governance

(a) Overcoming the Limits of International Law Alone

As evidenced in Chapter 8, national-level systems of law, i.e., public international law, private international law and domestic law, will remain the most powerful and influential systems of governance for some time.[263] However, seeking a multiple-level and transnational approach does not equate to the demotion or devaluation of national governments; but instead recognises the future role of national governments as being more functional within the multi-level governance framework, providing valuable systems of democratic accountability, as well as an ability to exercise certain monopolies over citizens, including over domestic public services, fiscal rules and taxation, and municipal laws.[264] Rather, what becomes necessary is the softening or reconfiguring of exclusive national sovereignty – with its values of absolutism, equality and hard political borders – whenever dealing with matters of a cross-border and transboundary nature. When one considers, therefore, that the production of certain global public goods radiates many ecological and psycho-social externalities which unavoidably concern external and future communities, such as the protection of the natural and historic environment, one could conclude that the production of such goods cannot fall to the exclusive remit of the nation state, even within its own territory.

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[263] Marauhn, T., (2008), 'Changing Role of the State', in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 727-748, Oxford University Press (Oxford), at pp. 728-729; Eckerberg, K. and Joas, M., (2004), 'Multi-Level Environmental Governance: A Concept Under Stress?', 9(5) *Local Environment* 405-412, at p. 411; MacCormick, N., (1993), 'Beyond the Sovereign State', 56(1) *Modern Law Review* 1-18; Walker, N., (2016), 'Constitutional Pluralism Revisited', 22(3) *European Law Journal* 333-355; Supra n. 253, Bodansky, Brunnée and Hey, at p. 22; Kaul, I., Grunberg, I. and Stern, M., (1999), 'Global Public Goods: Concepts, Policies and Strategies', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 450-507, Oxford University Press (Oxford), at p. 466; Harrison, J., (2011), *Making the Law of the Sea: A Study in the Development of International Law*, Cambridge University Press (Cambridge), at p. 283; Boyle, A. and Chinkin, C., (2007), *The Making of International Law*, Oxford University Press (Oxford), at pp. 41-46.

[264] Zürn, M., (2012), 'Global Governance as Multi-Level Governance', in *The Oxford Handbook of Governance*, D. Levi-Faur (Ed.), 730-774, Oxford University Press (Oxford), at p. 735; Franck, T.M., (1992), 'The Emerging Right to Democratic Governance', 86(1) *American Journal of International Law* 46-91; Peters B.G. and Pierre, J., (2006), 'Governance, Accountability, and Democratic Legitimacy', in *Governance and Democracy: Comparing National, European and International Experiences*, A. Benz and Y. Papadopoulos (Eds.), 29-43, Routledge (Abingdon); Goetz, K.H., (2008), 'Governance as a Path to Government', 31(1-2) *West European Politics* 258-279. Barrett, S., (1999), 'Montreal versus Kyoto: International Cooperation and the Global Environment', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 192-219, Oxford University Press (Oxford), at p. 194.

Nevertheless, and quite unsurprisingly, the decision to soften the hard edges of sovereignty and to weaken state autonomy will be controversial, complex and difficult. The recent rise in populist pro-nationalist sentiments in many parts of the world is well-known,[265] as are the concerns of many developing, emerging or postcolonial economies who now, quite reasonably, want their own opportunity to prosper independently as market nations and to assert their new sovereign right to self-governance.[266] This point came across clearly from almost all of the interviewees in this study who, while accepting that strict defences of national sovereignty could be one of the principal difficulties facing the protection of the marine environment, were also clear that many communities and present-day citizens are increasingly looking in the very opposite direction.[267] Indeed, there are several legitimate concerns with the weakening of state power, as broadly explored in Chapter 8. For example, there remains a widely and strongly held belief that the nation state is the only legitimate source of political authority, with systems of constitutional accountability and recognised and respected democratic processes, such as elections and political parties.[268] Unfortunately, there are also many who still regard the nation state as the rightful mechanism for dividing global civil society into discrete ethnic or cultural groupings.

However, as has been argued in this thesis and has been given thorough scrutiny through an abundance of literature and research across different research fields, there is a great risk to future generations if we continue to place too much emphasis on traditional national divides. Instead, the nation state will eventually be forced to adapt to its new modern, globalised, pluralised, multi-level, multi-cultural and increasingly cosmopolitan surroundings.[269] Fortunately, the choice between greater transnational governance and

[265] Eatwell, R. and Goodwin, M., (2018), *National Populism: The Revolt Against Liberal Democracy*, Pelican (Gretna, LA); Goldberg, J., (2018), *Suicide of the West: How the Rebirth of Tribalism, Populism, Nationalism, and Identity Politics Is Destroying American Democracy*, Crown Forum (New York); De Vries, C.E., (2018), *Euroscepticism and the Future of European Integration*, Oxford University Press (Oxford); Stocker, P., (2017), *English Uprising: Brexit And The Mainstreaming Of The Far-Right*, Melville House (New York).

[266] Horn, N., (1982), 'Normative Problems of a New International Economic Order', 16(4) *Journal of World Trade* 338-351; Clapham, C., (1999), 'Sovereignty and the Third World State', 47(3) *Political Studies* 522-537; Beeson, M., (2003), 'Sovereignty Under Siege: Globalisation and the State in Southeast Asia', 24(2) *Third World Quarterly* 357-374; Hannum, H., (1996), *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press (Philadelphia).

[267] See Section 3 below.

[268] Supra n. 264.

[269] Archibugi, D., (2004), 'Cosmopolitan Democracy and its Critics: A Review', 10(3) *European Journal of International Relations* 437-473; Chandler, D., (2003), 'New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty', 51(2) *Political Studies* 332-349; Hudson, W. and Slaughter, S. (Eds.), (2007), *Globalisation and Citizenship: The Transnational Challenge*, Routledge (Abingdon); Sáiz. A.V., (2005), 'Globalisation, Cosmopolitanism and Ecological Citizenship', 14(2) *Environmental Politics*

the preservation of international order need not be binary and, in fact, both forms of governance can interact within a productive, positively-reinforcing and synergetic relationship. Three means by which this could happen, for example, might be by the forces of global constitutionalism, global administrative law, and global legal pluralism. In each case, as argued below, joining a national-level treaty framework such as the UNESCO Convention will actually assist in facilitating and hastening such transnationalisation.

(b) Encouraging International Law by Transnational Law – and Facilitating Transnational Law by International Law

One of the potential pathways, discussed in Chapter 6, is by global constitutional law. This recognises the gradual internationalisation of constitutional norms and values, such as rules imposing an obligation to protect concerns of humankind, which over time become increasingly vivid and harder to derogate from.[270] States and international adjudicators will feel increasingly compelled to comply with such norms, such as by entering into and enforcing treaties which promote such values or by customarily observing such principles along with an opinio juris sive necessitatis.[271] The liberal and increasingly decentralised administration of modern states also provides an environment where internal actors and courts may also be compelled to adopt and apply such external values, despite existing discrepancies in their own national law.[272] Quite simply, the more that global civil society promotes the value of UCH protection, expanding and forcing the case for its necessary import on behalf of all humankind, the more that such erga omnes

163-178; Held, D., (2003), 'Cosmopolitanism: Globalisation Tamed?', 29(4) *Review of International Studies* 465-480;

[270] Kotzé, L., (2019), 'A Global Environmental Constitution for the Anthropocene?', 8(1) *Transnational Environmental Law* 11-33; Abate, R., (2017), *Climate Justice: Case Studies in Global and Regional Governance Challenges*, Environmental Law Institute (Washington DC); Bosselmann, K., (2015), 'Global Environmental Constitutionalism: Mapping the Terrain', 21(2) *Widener Law Review* 171-186; May, J.R. and Daly, E., (2014), *Global Environmental Constitutionalism*, Cambridge University Press (Cambridge); Boyle, A., (2006), 'Human Rights or Environmental Rights? A Reassessment', 18(3) *Fordham Environmental Law Review* 471-511.

[271] Ibid; Klabbers, J., Peters, A. and Ulfstein, G., (2011), *The Constitutionalization of International Law*, 2nd Edn, Oxford University Press (Oxford); Peters, A., (2012), 'Are We Moving Towards Constitutionalization of the World Community?', in *Realizing Utopia - The Future of International Law*, A. Cassese (Ed.), 118-135, Oxford University Press (Oxford); Lang, A.F. and Wiener, A. (Eds.), (2017), *Handbook on Global Constitutionalism*, Edward Elgar (Cheltenham); Belov, M. (Ed.), (2018), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, Hart Publishing (Oxford); Peters, A., (2009), 'The Merits of Global Constitutionalism', 16(2) *Indiana Journal of Global Legal Studies* 397-412.

[272] Slaughter, A-M., (2004), *A New World Order*, Princeton University Press (New Jersey); Moravcsik, A., (1997), 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51(4) *International Organization* 513-553; Aceves, W.J., (2000), 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation', 41(1) *Harvard International Law Journal* 129-184.

norms will influence national societies, policies and judiciaries.[273] Therefore, joining and supporting the UNESCO Convention will further assist the development of such peremptory norms; while the development of peremptory norms will incentivise joining the Convention.

The second pathway by which inevitable processes of transnationalisation in a globalised world will positively interact with international law is by global administrative law. This recognises that another force driving forward transnational law is the inevitable and increasing delegation from states to external administrative agencies and actors, who undertake many of the administrative legal functions on behalf of states. Such agencies are often public-private hybrids or even privately instituted networks, in which non-state actors and other global governors operating in networks across different levels can actively participate and influence law.[274] Such transgovernmental or administrative networks will continue to significantly influence compliance and interact positively with state policy, particularly in areas of complexity or requiring technical expertise beyond the shrinking remit of state budgets.[275]

The likely difficulty of the United Kingdom to leave the supranational institution of the European Union, despite committed efforts to do so by its own government, is in some ways another example of this. A particular difficulty has been the infeasibility of assuming administration of a complex matrix of transboundary governance issues which

[273] Shaffer, G.C., (2012), 'Transnational Legal Process and State Change', 37(2) *Law & Social Enquiry* 229-264; Koh, H.H., (1996), 'Transnational Legal Process', 75(1) *Nebraska Law Review* 181-208; Berman, P.S., (2004), 'Judges as Cosmopolitan Transnational Actors', 12(1) *Tulsa Journal of Comparative & International Law* 102-122; Keohane, R.O., 'When Does International Law Come Home?', 35(3) *Houston Law Review* 699-714; Zumbansen, P., (2012), 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism', 21(2) *Transnational Law & Contemporary Problems* 305-336.

[274] Kingsbury, B., Krisch, N. and Stewart, R.B., (2005), 'The Emergence of Global Administrative Law', 68(3) *Law and Contemporary Problems* 15-62; Cassese, S. (Ed.), (2016), *Research Handbook on Global Administrative Law*, Edward Elgar (Cheltenham); Cassese, S., (2005), 'Administrative Law Without the State – The Challenge of Global Regulation', 37(1) *New York University Journal of International Law and Politics* 663-694; Chesterton, S., (2008), 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', 14(1) *Global Governance* 39-52; Knox, J.H., (2001), 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission', 28(1) *Ecology Law Quarterly* 1-122; Meidinger, E., (2017), 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry', 17(1) *European Journal of International Law* 47-87.

[275] Ibid; Raustiala, K., (2002), 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', 43(1) *Virginia Journal of International Law* 1-92; Eberlein, B. and Newman, A.L., (2008), 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union', 21(1) *Governance* 25-52; Slaughter, A-M. and Hale, T.N., (2010), 'Transgovernmental Networks', in *The SAGE Handbook of Governance*, M. Bevir (Ed.), 342-351, Sage Publications (London); Bach, D. and Newman, A.L., (2010), 'Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation', 64(3) *International Organization* 505-528.

have been absorbed by the EU over the years.[276] Combining this with the findings in Chapter 7, which argued that the lower collective action threshold of regional-level systems and regimes will also entice states towards the collective gains, also makes it likely that transnational law will continue to drive up national standards in pursuance of global public goods. In entering international treaties, therefore, states can be encouraged to sacrifice certain technical functions to agencies with a better handle on transboundary concerns, including the common concerns of humankind. This same absorption of administrative law to external agencies and actors can therefore be found in the UNESCO Convention and the LOSC, where a growing role for public-private institutions – such as the UCH Scientific and Technical Advisory Board (STAB), International Maritime Organisation and International Seabed Authority – could see them increasingly influence transnational norms without complete intergovernmental oversight; instead relying on more intricate and nuanced systems of accountability to global civil society.

Another key driving force of transnational law, as explored in Chapter 5, is by global legal pluralism. This more broadly speaks of all actors engaging with laws which arise outside of traditional national law, operating through their own systems of accountability, legitimacy, scrutiny, behavioural modification, lawmaking and enforcement.[277] It can include various networks and communities of non-state and subnational actors, who each have the capacity to create powerful social or legal norms, without the need for all of the traditional state legislative and judicial functions. In some cases, these internally or co-regulated systems – such as the Forest Stewardship Council certification,[278] Marine

[276] E.g., Owen, J., Shepheard, M. and Stojanovic, A., (2017), 'Implementing Brexit: Customs', Institute for Government (London); LaMaster J.C. and Hammerson, M., 'Brexit and the UK Oil & Gas Sector', 28 *Denning Law Journal* 9-18, at p. 12; Fawz, K., Pollard, C., Tern, P., Ayuso-Garcia, A., Gillespie, J. and Thomsen, I., (2017), 'Evaluating the Impact of Brexit on the Pharmaceutical Industry', 10 *Journal of Pharmaceutical Policy and Practice* 32-43.

[277] Helfand, M.A., (2015), 'Introduction', in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, M.A. Helfand (Ed.), 1-14, Cambridge University Press (Cambridge), at p. 2; Etty, T., Heyvaert, V., Carlarne, C., Farber, D., Lin, J. and Scott, J., (2014), 'Pursuing Transnational Policy Change', 3(2) *Transnational Environmental Law* 229-239, at p. 235; Krisch, N., (2010), *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press (Oxford), at pp. 69-108; Zumbansen, P., (2013), 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power', 76(2) *Law and Contemporary Problems* 117-138; Michaels, R., (2007), 'The True *Lex Mercatoria*: Law Beyond the State', 14(2) *Indiana Journal of Global Legal Studies* 447-469; Twining, W., (2009), *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge University Press (Cambridge), at pp. 362-375; de Sousa Santos, B., (1995), *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, Routledge (Abingdon).

[278] Tollefson, C., Gale, F. and Haley, D., (2008), *Setting the Standard: Certification, Governance, and the Forest Stewardship Council*, University of British Columbia Press (Vancouver); Eden, S., (2009), 'The Work of Environmental Governance Networks: Traceability, Credibility and Certification by the Forest Stewardship Council', 40(3) *Geoforum* 383-394; Marx, A. and Cuypers, D., (2010), 'Forest Certification as a Global Environmental Governance Tool: What is the Macro-Effectiveness of the Forest Stewardship Council?', 4(4) *Regulation & Governance* 408-434.

Stewardship Council certification[279] and International Council of Museums Code of Ethics,[280] just as examples – have the capacity to impact behaviours of citizens without the need for state intervention.[281] In other cases, such as following the necessary expansion of international commercial arbitration or online dispute resolution, it is possible that actors self- or co-regulating in the transboundary space will force sovereign states to resign their usual juridical functions, decrease their public scrutiny role, or even facilitate such developments so as to better control such unavoidable transnational regimes and networks.[282] Similarly, regional networks between subnational actors and local councils will enhance the quality of national law by applying pressure on their national governments from the bottom-up.[283]

However, again, it is not only the inevitable development of issue networks and transnational communities outside of states that will lead to the eventual influence of international law towards transnational values; but also the development of international law which can help hasten, improve or facilitate the development of transnational and

[279] Martin, S.M., Cambridge, T.A., Grieve, C., Nimmo, F.N. and Agnew, D.J., (2012), 'An Evaluation of Environmental Changes Within Fisheries Involved in the Marine Stewardship Council Certification Scheme', 20(2) *Reviews in Fisheries Science* 61-69; Cummins, A., (2004), 'The Marine Stewardship Council: A Multi-Stakeholder Approach to Sustainable Fishing', 11(2) *Corporate Social Responsibility and Environmental Management* 85-94.

[280] Taşdelen, A., (2016), The Return of Cultural Artefacts: Hard and Soft Law Approaches, Springer (New York); Frigo, M., (2009), 'Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property', 16(1) *International Journal of Cultural Property* 49-66.

[281] Supra n. 277; Halliday, T.C. and Shaffer, G.C., (Eds.) (2014), *Transnational Legal Orders*, Cambridge University Press (Cambridge); Marx, A., (2011), 'Global Governance and the Certification Revolution: Types, Trends and Challenges', in *Handbook on the Politics of Regulation*, D. Levi-Faur (Ed.), 590-603, Edward Elgar (Cheltenham); Karlsson-Vinkhuyzen, S.I., (2011), 'Global Regulation through a Diversity of Norms: Comparing Hard and Soft Law', in *Handbook on the Politics of Regulation*, D. Levi-Faur (Ed.), 604-614, Edward Elgar (Cheltenham); Stone Sweet, A., (2006), 'The New *Lex Mercatoria* and Transnational Governance', 13(5) *Journal of European Public Policy* 627-646.

[282] Marsden, C.T., (2011), *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, Cambridge University Press (Cambridge); Schultz, T., (2004), 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust', 6(1) *North Carolina Journal of Law & Technology* 71-106; Gibbons, L.J., 'No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace', 6(3) *Cornell Journal of Law and Public Policy* 475-552; Martin, J.B., (2016), 'Jurisdictionalists v. Contractualists: Who is Winning in the Mandatory Law Debate in International Commercial Arbitration?', 27(4) *American Review of International Arbitration* 475-493; Martin, J.B., (2017), 'Delivering Due Process and Procedural Efficiency at Low Cost: The Grail Quest of International Online Arbitration', 14(1) *Transnational Dispute Management* (at: https://www.transnational-dispute-management.com/article.asp?key=2468); Ibid, Stone Sweet; Zumbansen, P., (2002), 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', 8(3) *European Law Journal* 400-432; Calliess, G-P., (2002), 'Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law', 23(2) *Zeitschrift für Rechtssoziologie* 185–216.

[283] Supra nn. 274-275; Fünfgeld, H., (2015), 'Facilitating Local Climate Change Adaptation Through Transnational Municipal Networks' 12 *Current Opinion in Environmental Sustainability* 67-73; Bulkeley, H., Davies, A., Evans, B., Gibbs, D., Kern, K. and Theobald, K., (2003), 'Environmental Governance and Transnational Municipal Networks in Europe', 5(3) *Journal of Environmental Policy & Planning* 235-254.

regional systems of governance. For example, intergovernmental and supranational treaties can institute collaborative spaces through which stakeholders can be given the space to interact, communicate and eventually collaborate.[284] A good example will be the growing future role for transboundary spatial planning tools, such as marine spatial planning and the creation of transboundary marine protected areas. Such processes will ensure that transnational communities can form networks, establish new rules and grow their influence, but these processes can be facilitated and significantly hastened by national law and international treaty. For instance, Lisa Martin has extolled the facilitative benefits of international regimes for achieving more effective cooperation and communication among all stakeholders, where transnational organisations can facilitate the pursuit of 'global cooperative goals'.[285] Similarly, Bodansky has listed numerous advantages that international law can provide in the attainment of aggregate-effort global public goods, predominantly revolving around the provision of information, the legitimisation and standardisation of norms, and the empowerment of non-state actors in the global framework.[286] In other words, national-level law can facilitate effective transnational law and governance; and transnational law can be highly influential in changing national-level law.

(c) Enhancing the Protection of Underwater Cultural Heritage by both Transnational Law and International Law

Given this positive interplay and complementarity between international and transnational law, there should be many transnational gains through widening participation in international treaties, such as the UNESCO Convention. For example, the resulting increased international subscription to values recognising the importance of

[284] Schleifer, P., (2013), 'Orchestrating Sustainability: The Case of European Union Biofuel Governance', 7(4) *Regulation & Governance* 533-546; Abbott, K.W. and Snidal, D., (2010), 'International Regulation Without International Government: Improving IO Performance through Orchestration', 5(3) *The Review of International Organizations* 315-344; Bingham, LB., Nabatchi, T. and O'Leary, R., (2005), 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government 65(5) *Public Administration Review* 547-558; Österblom, H., Gårdmark, A., Bergström, L., Müller-Karulis, B., Folke, C., Lindegren, M., Casini, M., Olsson, P., Diekmann, R., Blenckner, T. and Humborg, C., (2010), 'Making the Ecosystem Approach Operational – Can Regime Shifts in Ecological and Governance Systems Facilitate the Transition?', 34(6) *Marine Policy* 1290-1299; Eberlein, B., Abbott, K. W., Black, J., Meidinger, E. and Wood, S., (2014), 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis', 8(1) *Regulation & Governance* 1-21; Finck, M., (2018), 'Digital Co-Regulation: Designing a Supranational Legal Framework for the Platform Economy', 43(1) *European Law Review* 47-68.

[285] Martin, L.L., (1999), 'The Political Economy of International Cooperation, in Global Public Goods: Cooperation in the 21st Century', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 51-64, Oxford University Press (Oxford), at p. 63.

[286] Bodansky, D., (2012), 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' 23(3) *European Journal of International Law* 651-668, at pp. 659-660.

protecting UCH will subsequently accelerate the coagulation of such universal values among all transnational actors and governors, thus influencing the policies and levels of compliance among other states.[287] The UNESCO Convention provides this shift in mind-frame. For example, each Guérin,[288] Manders,[289] Williams,[290] Firth[291] and Aznar[292] made statements in interview highlighting the clear shift in language which the UNESCO Convention instils, thus further embedding the norm of UCH protection among regulators and society generally. The Convention also sets the framework for future communication and cooperation between all actors operating in networks with or without state scrutiny, in the pursuit of more effective means of governance and enforcement, as highlighted above. In addition to all of this, the Convention also opens states themselves to collaborative dialogue over the protection of UCH, in a growing cognisance of its status as a common concern of humankind.[293]

The grand irony being that, despite all criticism of national-level governance in this thesis, this system of governance is likely to remain important in *hastening* the quality and strength of transnational actors and regimes for some time. As Kaul et al once wrote, the 'paradox of global public goods . . . is that their provision has to start nationally […]. International efforts can complement, coordinate and monitor national endeavours but cannot substitute for them.'[294] Treaties such as the UNESCO Convention and LOSC should therefore be understood for what they are: 'framework treaties', which are wholly intended to set the initial framework for future regime-thickening, proactive international

[287] 'In some cases, international regimes help promote -- or restore – universalism, such as the universal recognition of basic human rights' (Kaul, I., Grunberg, I. and Stern, M., (1999), 'Defining Global Public Goods', in *Global Public Goods: International Cooperation in the 21st Century*, I. Kaul, I. Grunberg and M. Stern (Eds.), 2-16, Oxford University Press (Oxford), p. 14).
[288] Guérin, U., (2018), Interview with Ulrike Guérin, 16 May 2018, Transcript on File.
[289] Supra n. 237, Manders.
[290] Supra n. 237, Williams.
[291] Supra n. 237, Firth.
[292] Supra n. 240, Aznar.
[293] 'The hortatory treaty is a way of saying that the states' interests are not so divergent that further negotiations in the near future would be futile' (Goldsmith, J.L. and Posner, E.A., (2003), 'International Agreements: A Rational Choice Approach', 44(1) *Vanderbilt Journal of International Law* 113, 141); Fischhendler, I., (2008), 'Ambiguity in Transboundary Environmental Dispute Resolution: The Israeli-Jordanian Water Agreement', 45(1) *Journal of Peace Research* 91, at pp. 92-93; Ronzitti, N., (2012), 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law', in *Yearbook of the Institute of International Law - Volume 74 (Session of Rhodes, 2011)*, 130, Editions A. Pedone, 141-143, at p. 160; Alves, F.J., (2010), 'Portugal's Declaration During the Negotiation of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: International Protection and Cooperation versus Possession', 5(2) *Journal of Maritime Archaeology* 159-162, at pp. 162-163; 'So, if you have all the costal countries around the North Sea ratify, or the majority of them, then the UK will be able to – in a sense – demand that the Dutch do something about it. Whereas at the moment they can just encourage and there's not an obligation.' (Supra n. 237, Firth).
[294] Supra n. 263, Kaul, Grunberg and Stern, at p. 469.

cooperation and transnational network facilitation. As Barrett once put it, it is better to consider the 'evolution of the treaty process', given that 'it simply will not be possible to construct a treaty that gets it all right from the start'.[295] This accords with the influence and importance that Abbott and Snidal placed on international soft law, given its ability to influence the subsequent development of more complex processes of global governance.[296] On this basis, they say, the use of broader equivocal targets in an international treaty should not automatically be regarded as a failure.[297] As Firth rightly says, therefore, the constructive ambiguities throughout the UNESCO Convention 'are there intentionally' and, while 'they will cause problems in the future . . . they are still outweighed [by] the positives.'[298]

However, neither can we remain obsessed or excessively focused on international law and the UNESCO Convention alone. Wherever state action is stalling, or compliance has become weak, such as relating to reflexive, complex or low-political issues, we must then dedicate greater resources and research to the facilitation and stimulation of communication, coordination and collaboration among all other actors and governors across all levels of governance. Indeed, as demonstrated again above and throughout this thesis, such global, regional and community-level actors, regimes and norms have the capacity to side-step, mediate or coerce national policy or state behaviour. Therefore, despite Flatman's and Dromgoole's concerns that powerful flag states will be slow to join the Convention, for fear of creeping coastal state jurisdiction,[299] the growth of transnational regimes, systems and norms – operating above and below the state – may eventually force such states into submission or help coordinate their future policies towards transnational norms anyway. Furthermore, in future epochs – by forces which include global constitutionalisation, transboundary administrative delegation, legal pluralism, and supranationalism – inter-state treaties such as the UNESCO Convention are susceptible to becoming fully superseded, enhanced or replaced in the areas where intergovernmental collective action can advance the common interest no further.[300]

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[295] Barrett, S., (2003), *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Oxford University Press (Oxford), at pp. 17-18.
[296] Abbott, K.W. and Snidal, D., (2000), 'Hard and Soft Law in International Governance', 54(3) *International Organization* 421-456.
[297] Ibid.
[298] Supra n. 237, Firth.
[299] Supra n. 240, Flatman, at p. 173; Flatman, J., (2009), 'Conserving Marine Cultural Heritage: Threats, Risks and Future Priorities', 11(1) *Conservation and Management of Archaeological Sites* 5-8, at p. 7; Supra n. 248, Dromgoole, at p. 90.
[300] Supra nn. 270-283; Supra n. 242, Krisch, at p. 28.

Ultimately, global, regional and community solutions can and should be pursued *at the same time* as promoting the ratification of the UNESCO Convention: both options should be seen as complementary and neither should be exclusive of the other. This includes allocating greater resources and shifting attention towards effective regional and sub-regional schemes; as well as developing more effective systems and sharing best practices for integrating all local, dedicated, epistemic and professional communities into taking on a more powerful governance role. Their symbiotic interrelationship not only means that future policy efforts should be concentrated on both transnational legal pluralisation and national-level law; but also that, when one of these systems stalls or slows down, then subsequently putting more fuel into the other system can kickstart all the other actors, including national actors, back into collective action and so helping to leap over any impasses which have become entrenched in the former system. As has been evidenced, compliance has been most effective when it is driven by a combination of hard (inter-state) rules and more managerial or reflexive systems of compliance management.[301] In other words, in a period where ratifications and compliance with the UNESCO Convention has been weak to moderate, then all other transnational approaches – such as supranationalism, transnationalism, regionalism, and community empowerment – should be laid down more forcefully upon the table.

3. Future Challenges of Underwater Cultural Heritage Protection by Multi-Level Governance

The findings and arguments raised in this thesis have provided evidence that transnationalisation and multi-level stratification have various advantages which make them particularly desirable when addressing a complex, transboundary, low-political and universal public good, such as the protection of the marine historic environment. In the case of UCH protection, stronger efforts should be dedicated to the real empowerment and strengthening of transnational and public-private actors, such as NGOs, research institutions, the STAB, and ICOMOS's International Committee on the Underwater Cultural Heritage. UNESCO's recent initiative to twin various underwater archaeology research institutions in a global network and the recent conference bringing together various UCH-related NGOs from around the world are examples of positive

[301] Supra n. 274, Knox; Tallberg, J., (2002), 'Paths to Compliance: Enforcement, Management, and the European Union', 56(3) *International Organization* 609-643; Jacobson, H.K. and Brown Weiss, E., (1998), 'Assessing the Record and Designing Strategies to Engage Countries', in *Engaging Countries: Strengthening Compliance with International Environmental Accords*, E. Brown Weiss and H.K. Jacobson (Eds.), 511-554, MIT Press (Cambridge MA).

developments in this regard.[302] Campaigners, conservationists and stakeholder groups should also keep working on the establishment of constitutionalised and baseline norms which place erga omnes obligations on humankind to protect UCH as a common concern of humankind.[303]

Policymakers also need to start recognising that the LOSC and UNESCO Convention are not alone sufficient to protect UCH, but should be understood as 'framework conventions', from which future regional and sub-regional agreements – such as within the North-East Atlantic, Baltic Sea, Mediterranean and Caribbean, and across South and Latin America, Africa, Pacific Islands, and South East Asia – place tougher and more detailed instructions and obligations on the various stakeholders and communities implicated in UCH protection, including nation states themselves. The need to proactively design further and more detailed rules is what should be understood by past state-to-state commitments to 'cooperate' in the protection of UCH on behalf of all humankind, as detailed in Chapter 3; as well as with agreements to continue processes of regime-thickening (or future sovereignty-sacrificing commitments) in LOSC Art. 303(4) and UNESCO Convention Art. 6.[304] Policymakers also need to properly value what can be achieved by giving communities and stakeholders much greater opportunity and autonomy to achieve UCH protection themselves, including the careful provision of meta-regulation and drafting new systems of public-oriented property and trust laws which can provide incentive and buy-in for communities to protect cultural heritage on behalf of humankind and future generations. This also means recognising the importance and value of stakeholder involvement in the reflexive governance of complex social challenges, by providing facilitation or mediation of collaborative spaces and the provision of rights, tools and powers to enable communities to self- or co-govern effectively and sustainably.

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[302] UNESCO, (2019), 'Underwater Cultural Heritage: Meetings on the 2001 Convention on the Protection of the Underwater Cultural Heritage', UNESCO, (at: http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/meetings/meetings-2001/; accessed: 1 June 2019); UNESCO UNITWIN Underwater Archaeology Network, (at: http://www.underwaterarchaeology.net; accessed 1 June 2019).

[303] Bodansky, D., (2009), 'Is There an International Environmental Constitution?', 16 *Indiana Journal of Global Legal Studies* 574-580; Fitzmaurice, M., (2008), 'International Responsibility and Liability', in *The Oxford Handbook of International Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 1010-1036, Oxford University Press (Oxford), at p. 1020; Kiss, A., (2005), 'The Legal Ordering of Environmental Protection', in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, R. MacDonald and D. Johnston (Eds.), 567-584; Brunnée, J., (2008), 'Common Areas, Common Heritage and Common Concern', in *The Oxford Handbook of International Law*, D. Bodansky, J. Brunnée and E. Hey (Eds.), 550-573, Oxford University Press (Oxford), at pp. 553-557; Nanda, V.P. and Pring, G.R., (2012), *International Environmental Law in the 21st Century*, 2nd Edn, Martinus Nijhoff (Leiden), at pp. 39-40.

[304] Supra n. 235, UNESCO Convention, Art. 6; Supra n. 236, LOSC, Art. 303(4).

Through forces such as externalisation, privatisation and innovation, such transnationalisation is arguably an inevitable development in our future globalised world.[305] As a result, traditional regulatory actors and systems, as well as civil society more broadly, should be focusing energy and resources on being *prepared* for this gradual turn towards more complex, network-like and holistic modes of governance interconnecting with, within and without the conventional grandeur of the nation state.[306] They should also be moving more quickly towards such developments in the production of transboundary goods, such as the protection of the marine environment, given the clear failures and disadvantages which are inherent in the present horizontal model of exclusive inter-state government. Naturally, there will be many challenges which are likely to arise in the future implementation of transnational governance approaches to UCH protection, of which some pertinent examples can be highlighted as this study closes.

One of the key challenges, noted several times throughout this thesis, is the general resistance in much of society to the further resignation of national sovereignty. A well-known example is the European Union which, despite its impressive achievements when reviewed objectively, is likely to have its activities significantly stymied for some time by recent anti-establishment and nativist rhetoric in the European political space. Certainly, some of these concerns relating to globalism and regulation beyond the state are legitimate, especially in terms of democratic accountability, transparency and excessive centralisation. As such, work should be done to increase the legitimacy, accountability, transparency, reflexivity and inclusivity of such external networks and actors.[307] This also includes better communication of the equal democratic legitimacy of

[305] Mol, A.P., (2016), 'The Environmental Nation State in Decline', 25(1) *Environmental Politics* 48-68; Supra n. 242, Heal, at pp. 221-222; Gillespie, A., (2012), 'Science, Values and People: The Three Factors that Will Define the Next Generation of International Conservation Agreements', 1(1) *Transnational Environmental Law* 169-182, at pp. 179-182; Supra n. 263, Kaul, Grunberg and Stern, at p. 41-42; Tuerk, H., (2012), *Reflections on the Contemporary Law of the Sea*, Martinus Nijhoff (Leiden), at p. 186.

[306] As Kotzé puts it, 'the broader context of the Anthropocene . . . highlights the urgent need for a holistic strategy to address the most critical *global* environmental governance challenge of all times' (Kotzé, L.J., (2012), 'Arguing Global Environmental Constitutionalism', 1(1) *Transnational Environmental Law* 199-233, at p. 218).

[307] Harlow, C., (2006), 'Global Administrative Law: The Quest for Principles and Values', 17(1) *European Journal of International Law* 187-214; Nanz, P. and Steffek, J., (2004), 'Global Governance, Participation, and the Public Sphere', 39(2) *Government and Opposition* 314-335; Scholte, J.A., (2004), 'Civil Society and Democratically Accountable Global Governance', 39(2) *Government and Opposition* 211-233; Scholte, J.A. (Ed.), (2011), *Building Global Democracy? Civil Society and Accountable Global Governance*, Cambridge University Press (Cambridge); Papadopoulos, Y., (2007), 'Problems of Democratic Accountability in Network and Multilevel Governance', 13(4) *European Law Journal* 469-486; Sørensen E. and Torfing, J., (2005), 'The Democratic Anchorage of Governance Networks', 28(3) *Scandinavian Political Studies* 195-218; Barr, M.S. and Miller, G.P., (2006), 'Global Administrative Law: The View from Basel', 17(1) *European Journal of International Law* 15-46; Hudson, A., (2001), 'NGOs' Transnational Advocacy Networks: From 'Legitimacy' to 'Political Responsibility'?', 1(4) *Global*

supranational institutions, such as the European Union. As Maarleveld responded, while governance approaches beyond international law are likely to improve the protection of UCH, 'that is easily said, but not easily done of course. And, let's be honest, international developments . . . are not very promising at present.'[308] Similarly, Firth and Maarleveld each expressed concerns with the powerful role that nationality still plays when engaging communities with the significance of UCH sites and the need for their protection.[309] However, there are potential advantages to this. As Williams responded, Brexit presents an opportunity to engage national communities with strengthened regional systems of protection, by highlighting the national interests at stake.[310] Similarly, Manders and Maarleveld pointed to the broader powers that will be available by better storytelling, rather than fact-telling, when engaging communities with the need to accept stronger rules of protection.[311]

There is also the intriguing, but complex, question of how traditional inter-national law will interact and respond to transnational law arranged over multiple levels, with the resulting duality which is increasingly present in integrated models of ocean management.[312] For example, even though multiple-layered networks and transnational communities will be able to improve upon the protection of UCH, the present system of ocean management is still entirely undergirded by a rigid constitution allocating exclusive state rights and powers.[313] According to the LOSC, flag states remain exclusive owners of their UCH or legislators for UCH flagged to them beyond other states' coastal waters; whereas coastal states remain exclusive legislators for UCH in their coastal waters or over natural resources in their wider economic zones. The *exclusivity* which is essential to both juridical situations makes it difficult to see states freely agreeing to resign such rights for the benefit of external interests, as argued in Chapters 3 to 5. As Maarleveld

Networks 331-352; Kingsbury, B. and Casini, L., (2009), 'Global Administrative Law Dimensions of International Organizations Law', 6(2) *International Organizations Law Review* 319-358.

[308] Supra n. 240, Maarleveld.

[309] 'It is indeed the national narratives that still do the best job. And, whereas at the other end, those are not the strongest narratives for protection, so. So that's a problematic paradox and it will be resolved at some point, but it will take time.' (Supra n. 240, Maarleveld); Supra n. 237, Firth; Firth, A., (2002), *Managing Archaeology Underwater: A Theoretical, Historical and Comparative Perspective on Society and its Submerged Past*, BAR Publishing (Oxford), at pp. 79-100.

[310] Supra n. 237, Williams.

[311] Supra n. 237, Manders; Supra n. 240, Maarleveld.

[312] See Section 2 above; Tanaka, Y., (2008), *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management of the Laws of the Sea*, Routledge (Abingdon).

[313] For example, Kraska writes how the LOSC is the 'centrepiece for oceans governance', because it 'recognizes or assigns freedoms, rights, duties, and jurisdiction among . . . *States* to enhance management and governance of the maritime space.' (Kraska, J., (2015), 'Military Operations', in *The Oxford Handbook of the Law of the Sea*, D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (Eds.), 866-887, Oxford University Press (Oxford), at p. 867 (emphasis added)).

responded, the LOSC 'will not be changed soon. […] It had an enormously long trajectory to get it negotiated and it has to do with power politics, well with everything, and it will not change.'[314] However, as argued above, many transnational forces – such as by global constitutionalism, administrative law and legal pluralism – will eventually constrain, influence or pressure states into further sovereignty-restraining regimes. However, the problem appears instead to be with the pace of adoption, which usually comes ex post destruction, rather than states refusing to consent to further constraints on their sovereignty in the fullness of time.

In this sense, the LOSC and UNESCO Convention should not be seen as set in stone. From a logical standpoint, no constitution which specifically allocates rights and obligations to different sectors of a society should be free from future modification as social circumstances and contexts evolve.[315] Indeed, the LOSC was negotiated in a context when the threats, values and challenges of UCH protection were not yet known or understood.[316] For example, and perhaps with an allusion to the growth of global governance and transnational law over the past few decades, Freestone says the exegesis of the LOSC is very different to many decades ago, given that an entirely different generation of law of the sea specialists are using it today.[317] He adds, however, that 'by the same token no-one . . . suggests that we need to start again.'[318] In many ways, this suggests that such products of intense inter-state bargaining should be understood as establishing the 'starting point' for nation states allocating their desired rights and obligations inter partes; after which they should adopt a more functional role, by subsequently diversifying and stratifying governance into more complex, nuanced and multi-faceted networks which increasingly utilise, coerce or limit their national sovereignty. This transition of the state from a territorial to a functional role, wherein it

[314] Supra n. 240, Maarleveld; Supra n. 237, Firth; c.f., By contrast, in interview Williams felt that it would not be long before the LOSC is renegotiated (supra n. 237, Williams).
[315] Suber, P., (1999), 'Amendment', in *Philosophy of Law: An Encyclopedia*, C.B. Gray (Ed.), 31-32, Routledge (Abingdon); Albert, R., Contiades, X. and Fotiadou, A., (Eds.), (2017), *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing (Oxford); de Búrca, G. and Scott, J. (Eds.), (2000), *Constitutional Change in the EU: From Uniformity to Flexibility*, Hart Publishing (Oxford).
[316] Scovazzi, T., (2006), 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', in *Art and Cultural Heritage: Law, Policy and Practice*, B.T. Hoffman (Ed.), 285-292, Cambridge University Press (Cambridge), at pp. 291-292; Supra n. 237, Williams; O'Keefe makes point that to see otherwise would mean effectively freezing the development of international law at a single point in time (O'Keefe, P.J., (1996), 'Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention', 20(4) *Marine Policy* 297-307, at p. 303).
[317] Freestone, D., (2013), 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas', in *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, D. Freestone (Ed.), 1-8, Martinus Nijhoff (Leiden), at p. 2
[318] Ibid.

helps to facilitate and improve the quality of future transnational governance networks, is widely understood.[319] The state could thus continue to enjoy a powerful and central mediatory role between the supranational (global) orders and subnational (local) orders and, wherever a problem is of an international nature, higher 'global' or 'regional' norms should one day be able to outrank the individual state's autonomy on the issue.[320] The nation state's interests should remain relevant so as to eventually be 'enmeshed' with humankind's collective interests, but not ruling as ultimate and supreme.[321]

Undoubtedly, many provisions within the LOSC and UNESCO Convention have – consciously or unconsciously – left leeway for the creation of future symbiosis between the international and transnational systems of governance. For example, not only do Articles 6 of the UNESCO Convention and Article 303(4) of the LOSC invite future regional and multi-level treaties which provide 'better' and stronger constraints on states, but Article 311(5) of the LOSC states that the treaty's limitation on the negotiation of future agreements which run counter to its constitutional decree would not include 'international agreements expressly permitted or preserved by other Articles of this Convention'.[322] In other words, given that UCH was expressly recognised as an object meriting protection and that it requires future regimes of preservation, under Article 303, it is safe to conclude that Article 311(5) leaves harbour for powerful sovereignty-constraining agreements which run counter to the original spirit and ethos of the LOSC.[323] Similarly, by not dealing with ownership and by prohibiting coastal states from assuming an exclusive legislative function over UCH, the UNESCO Convention has also left plenty of room for states to engage in negotiations over better and more effective systems of protection. This can be supported by the system of coordinating states, as explored in

[319] Borgese, E.M., (1998), *The Oceanic Circle: Governing the Seas as a Global Resource*, United Nations University Press (Tokyo); Supra n. 253, Bodansky, Brunnée and Hey, at p. 22; Supra n. 263, Marauhn, at pp. 728-729; Supra n. 295, Barrett, at pp. 53-54.
[320] Linklater, A., (1996), 'Citizenship and Sovereignty in the Post-Westphalian State', 2(1) *European Journal of International Relations* 77-103; Supra n. 263, Kaul, Grunberg and Stern, at p. 466; Reinicke, W.H., (1998), *Global Public Policy: Governing Without Government?*, Brookings Institution (Washington DC), at p. 57.
[321] Supra n. 263, Kaul, Grunberg and Stern, at pp. 473-474.
[322] Supra n. 236, LOSC, Art. 311(5).
[323] Strati, A., (1999), *Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary Prepared for UNESCO*, UN Doc. CLT-99/WS/8, UNESCO (Paris), at pp. 36-37; Carducci, G., (2003), 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96(2) *American Journal of International Law* 419-434, at p. 420; UNESCO, (1997), *Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage*, 12 March 1997, 151st Session, Executive Board, UN Doc. 151 EX/10, UNESCO (Paris), at Annex I, Para. 54; Forrest, C., (2008), 'Historic Wreck Salvage: An International Perspective', 33 *Tulane Maritime Law Journal* 347, at p. 376.

Chapter 3, as well as the requirement to include all states with a 'verifiable link, especially a cultural, historical or archaeological link' to UCH sites in such future negotiations.[324]

There are also a whole host of future challenges in the actual administration of such transnational modes of governance, as highlighted in Chapter 8. For example, the international system of world government remains attractive to many because it provides clear and predictable systems of accountability, in which it is easier for society to understand and scrutinise political developments. By contrast, embracing overlapping and multiple levels of public-private norms, actors and regimes is only likely to bemuse or even harmfully disaffect society. As above, therefore, more energy should be dedicated to understanding the role and placement of diverse governance regimes, as well as how and where civil society can be assured of democracy, fairness, accountability, opportunity, legitimacy and predictability. This could be assisted by the institution of a coordinating agent at the global or regional levels, who is responsible for overseeing regimes and driving up these same values.[325] As Aznar replied in interview, policy networks and forums would certainly help in protecting UCH, but such 'forums must be stable and transnational, permitting the presence of all stakeholders but avoiding the biased lobby of the most powerful among them.'[326]

There is also complexity and difficulty which is bred by taking stakeholder-inclusive approaches more generally, after bringing together diverse communities with conflicting or shifting public and private interests, values and perceptions. Most of the interview respondents in this study noted such understandable concerns with stakeholder inclusivity and with the difficulty of even identifying – let alone effectively engaging and empowering – the correct groups of stakeholders and at the correct stages in the governance process. Nevertheless, as was explored in Chapter 9, it is feasible that productive and collaborative conditions could be created by meta-regulation and by facilitative mediation, as well as by empowering and incentivising collaborative governance and problem-solving leadership. As Altvater responded, for example, community inclusivity in ocean governance is most effective when you have one or two

[324] Supra n. 235, UNESCO Convention, Arts. 6(2), 7(3), 9(5), 11(4), 18(3) and (4).
[325] As Shaffer puts it, '[f]isheries deplete, deserts expand, and aquifers diminish. International law scholarship, in the meantime, takes a turn towards celebrating pluralism without sufficiently accounting for institutional variation to address different contexts.' (Shaffer, G.C., (2012), 'International Law and Global Public Goods in a Legal Pluralist World', 23(3) *European Journal of International Law* 669-693, at p. 670.)
[326] Supra n. 240, Aznar.

people really leading the process. 'If you don't have these persons in the region or in the community,' she responds, then 'there is a dearth in interest'.[327]

Perhaps future integrated ocean management will adopt a more holistic and community-oriented approach, even looking to an emerging idea of more feminist conceptions of ocean governance that depart from our traditional system built upon territoriality and displays of military power.[328] Policymakers might also take notice of a growing development of holistic legal practice and dispute management, built around inclusivity, acceptance, mindfulness and open-mindedness.[329] As Weston and Bollier have said of the future model for ecological governance of the commons, 'given the cooperative nature of commons, conflicts and disputes within commons and rights-based ecological governance systems are not best settled by adversarial litigation or other such decision-making processes. They should be settled, instead, to the maximum extent feasible, through self-organized dispute resolution systems, using techniques and procedures that favor dialogue, mutual respect, and restorative outcomes among the disagreeing parties.'[330]

Finally, there is the inevitable challenge of shifting values and ethics surrounding the management of UCH more generally. Many of the starting points of UCH protection raised in Chapters 1 and 2 – such as in situ preservation, commercial exploitation, the powers of linked communities, the value of UCH, the definition of "underwater cultural heritage", ownership of UCH, sovereign immunity, jurisdiction, and the proper treatment of historic sites and of human remains – all also remain susceptible to future contestation and fluctuation.[331] Overall, however, all of the challenges emerging in the future transnational governance of UCH protection raised throughout this thesis and in this concluding chapter should be preferably viewed as matters which need to be addressed

[327] Altvater, S., (2018), Interview with Susanne Altvater, 17 May 2018, Transcript on File
[328] Gissia, E., Portman, M.E. and Hornidge, A-K., (2018), 'Un-Gendering the Ocean: Why Women Matter in Ocean Governance for Sustainability', 94 *Marine Policy* 215-219; Papanicolopulu, I., (2019), 'Introduction: Gender and the Law of the Sea – Oceans Apart?', in *Gender and the Law of the Sea*, I. Papanicolopulu (Ed.), 1-21, Martinus Nijhoff (Leiden); Mallia, P. and Testa, D., (2019), 'Elisabeth Mann Borgese, Gender and the Law of the Sea', in *Gender and the Law of the Sea*, I. Papanicolopulu (Ed.), 106-121, Martinus Nijhoff (Leiden).
[329] Daicoff, S., (2004), 'The Comprehensive Law Movement', 19(4) *Touro Law Review* 825-846; Daicoff, S., (2006), 'Law as a Healing Profession: The Comprehensive Law Movement', 6(1) *Pepperdine Dispute Resolution Law Journal* 1-62; Wright, J.K., (2019), 'Around the World with Integrated Law', *Enlivening Edge*, (at: https://www.enliveningedge.org/columns/around-world-integrative-law/; accessed 1 June 2019).
[330] Weston, B.H. and Bollier, D., (2013), *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons*, Cambridge University Press (Cambridge), at p. 191.
[331] Perez-Alvaro, E., (2019), *Underwater Cultural Heritage: Ethical Concepts and Practical Challenges*, Routledge (Abingdon).

by better and stronger regulation, rather than arguments in favour of safeguarding the traditional, consent-based and horizontal system of inter-national law. The only certainty, therefore, is that research into effective ways to promote and coordinate transnational governance over the marine environment should keep growing in the coming decades.

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